A

CORRECT ACCOUNT

OF THE

TRIALS

OF

CHARLES M'MANUS, JOHN HAUER, ELIZABETH HAUER, PATRICK DONAGAN, FRANCIS COX, AND OTHERS;

AT HARRISBURGH—JUNE OYER AND TERMINER, 1798.

FOR THE *MURDER* OF *FRANCIS SHITZ*,

ON THE NIGHT OF THE 28th DECEMBER, 1797,

AT HEIDELBERG TOWNSHIP, DAUPHIN COUNTY,

IN THE COMMONWEALTH OF PENNSYLVANIA.

CONTAINING,

THE WHOLE EVIDENCE,

AND THE

SUBSTANCE OF ALL THE LAW ARGUMENTS

IN THOSE CELEBRATED TRIALS.

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1798.

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AN ACCOUNT

OF THE TRIAL AND PROCEEDINGS AGAINST CHARLES M'MANUS, JOHN HAUER, AND OTHERS, FOR THE MURDER OF FRANCIS SHITZ, &c.

IT ſeems, pretty generally, to have been the practice to publiſh the moſt remarkable trials in capital and other criminal caſes, to gratify the public curioſity; and more eſpecially thoſe which have excited, at the time, any conſiderable attention, ariſing either from the remarkable circumſtances attending them, or the importance of the queſtion tried, eſtabliſhing ſome great public or conſtitutional queſtion. The bulk of the ſtate trials in that country from which we have derived our laws and mode of trial, and the numerous editions of that immenſe work, furniſh convincing evidence of the great attention which has hitherto been given to ſuch publications.

Among the many dreadful murders and aſſaſſinations, with the hiſtory and trial of which a conſiderable portion of the work juſt ſpoken of is taken up, there are few, if any, which appear to have been more cruelly and deliberately contrived than the bloody deed which will be detailed in the following ſheets.

CHARLES M'MANUS, PETER M'DONOGHY, PATRICK DONAGAN, and FRANCIS COX, were natives of Ireland, from whence they had but lately come into the United States.

JOHN HAUER was born in the county of Northampton, in Pennſylvania, of German parents. Not many years paſt he intermarried with ELIZABETH, the ſiſter of the deceaſed FRANCIS SHITZ, and daughter of PETER SHITZ,

a wealthy German, of Heidelberg township in the county of Dauphin. PETER SHITZ died in the month of April 1795. By his will he had deviſed to his daughter ELIZABETH, the wife of JOHN HAUER, one thouſand pounds, but the advancements he had previouſly made to her, were to be conſidered as part payment of that legacy. The whole reſidue of a very large eſtate he had bequeathed to his two ſons FRANCIS and PETER; with this further direction, that in caſe of the death of either of his ſons under age, OR without iſſue, his ſhare ſhould go to the ſurviving brother—paying, in ſuch event, an additional £.500 to his ſaid daughter ELIZABETH. FRANCIS SHITZ had attained his age but ſhortly before the murder was committed. PETER SHITZ is not yet more than 18 years of age. Theſe two boys formed the only obſtacles to bar JOHN HAUER and ELIZABETH his wife, from the enjoyment of the whole eſtate of old PETER SHITZ. This ſhort account of the ſituation of the family and eſtate, at once diſcloſes the baſe motives which induced JOHN HAUER to contrive a moſt diaboliçal ſyſtem of wickedneſs, the murder of the two brothers of his wife; the half of which dreadful purpoſe he fatally accompliſhed in the deſtruction of FRANCIS SHITZ.

Immediately after the murder was committed, the public ſuſpicion was fixed upon JOHN HAUER—and he was committed to gaol on the following day. CHARLES M'MANUS was alſo apprehended and committed—and his ſeveral ſtrange and contradictory confeſſions and declarations from time to time, induced the arreſt and commitment of the other priſoners.—Still, however, the evidence reſted ſolely upon circumſtances and conjecture; no direct proof could be procured as to the principal perpetrators of the horrid act. The public mind was extremely agitated and alarmed; and the circumſtances of ſo many being concerned, and the combination ſo long and ſo artfully concealed, gave great uneaſineſs to the people: Nor could any one be inſured againſt injuries to himſelf, and the violation of his property from a hardened and reſolute ſet of men, ſtrangers in the country, whoſe former characters were unknown, and who were now ſuppoſed to be leagued together for the purpoſes of murder and pillage, as occaſion or opportunity might offer.

In this ſituation of things, and in expectation of a full and true diſcloſure of every fact relative to this dreadful tranſaction, it was thought prudent by

the attorney for the Commonwealth to make uſe of CHARLES M'MANUS as a witneſs; and as he had charged JOHN HAUER and PETER M'DONOGHY as being preſent, doing the murder, at the houſe of FRANCIS SHITZ, whilſt he held their horſes at the end of the lane—and that the other priſoners were privy and conſenting to it, and had aſſiſted in forming the plan;—a bill was prepared in which JOHN HAUER and PETER M'DONOGHY were charged as principals, and PATRICK DONAGAN, FRANCIS COX, HUGH M'DONOUH and ELIZABETH HAUER as acceſſaries BEFORE the fact: which bill was found by the grand jury at March OYER and TERMINER 1798.

JOHN HAUER was firſt put upon his trial, and after it had proceeded a conſiderable length, he expreſſed an earneſt deſire to ſpeak to the judges—to whom he made a full confeſſion of his own guilt, as an acceſſary BEFORE the fact—but ſtrenuouſly denied his being preſent at the houſe the night of the murder—but that the murder was committed by CHARLES M'MANUS and PETER M'DONOGHY, and that the reſt of the priſoners were acceſſaries BEFORE the fact. The next morning he perſiſted in this confeſſion in open court—whereupon the court, on motion of the counſel for the commonwealth, diſcharged the jury from giving any verdict, and remanded the priſoner, in order that a new indictment might be ſent up according to the truth of the fact, as it came out upon HAUER's confeſſion. The ſtory of CHARLES M'MANUS being falſified in ſome very material parts, and it appearing moſt probable, from the other teſtimony, that he himſelf was the perſon who ſhot FRANCIS SHITZ, he was not examined as a witneſs on the trial of JOHN HAUER.

The entry or memorandum of this matter, as made by the preſident of the court, is taken from his notes, in the following words:

March 16th, 1798.

Eight o'clock P. M. The court adjourned till to-morrow morning at 9 o'clock. The priſoner had ſent for the preſident before the meeting of the court. Laſt night at 9 o'clock, the preſident of the court, with judge Gloninger, went to the gaol, when the priſoner made a full confeſſion of his guilt as acceſſary before the fact, but ſtrenuouſly denied his being a principal in the murder; which examination he ſwore to upon oath and ſubſcribed.

March 17th. The court being met and the priſoner at the bar, it was ſtated to him by the preſident, in the hearing of every one, that the priſoner had ſent for him and Mr. Gloninger: That they received his confeſſion as it reſpected the murder of Francis Shitz, which he had ſworn to and ſigned. The preſident then aſked him whether he would ſtand by that confeſſion, and whether it was true: The priſoner anſwered, he ſuppoſed he muſt, it was all true that ſtood in the paper.

Mr. C. Smith moved that the jury be diſcharged from the priſoner, to give the commonwealth an opportunity to file a new bill againſt the parties now known to the court as principals and acceſſaries,—on the authority of Foſt. 38. 76. 327—8.

Thereupon the court diſcharged the jury from giving any verdict on this indictment.

The counſel for the priſoner declined interfering, declaring that the priſoner had taken himſelf out of their hands—that his confeſſion was an act of his own, without conſulting them—and they had nothing further to ſay at preſent.

The trials of all the other priſoners were poſtponed, and the witneſſes recognized to the next court.

The evidence has not been given, as far as it went, upon this trial, as it will appear entire on the trials at June OYER & TERMINER.

JUNE 11th, 1798.

The following indictment was ſent to the grand jury, and returned by them on the 12th, A TRUE BILL.

At a Court of Oyer and Terminer and General Goal Delivery held at Harriſburgh for the County of Dauphin, before the honorable John Joſeph Henry Preſident, and his Aſſociates, Judges of the ſaid Court, on the ſecond Monday of June, in the year of our Lord one thouſand ſeven hundred and ninety-eight.

DAUPHIN COUNTY, ſſ.

THE Grand Inqueſt for the body of the county of Dauphin upon their oaths and affirmations reſpectively do preſent, That Charles M'Manus late of Heidelberg townſhip in the county aforeſaid Labourer, and Peter M'Donough late of the townſhip and county aforeſaid Labourer, otherwiſe called Peter M'Donoghy late of the townſhip and county aforeſaid Labourer, not having the fear of God before their eyes, but being moved and ſeduced by the inſtigation of the Devil, on the night of the twenty-eight day of December in the year of our Lord one thouſand ſeven hundred and ninety-ſeven, at Heidelberg townſhip in the ſaid county, and within the juriſdiction of this court, with force and arms in and upon a certain Francis Shitz, in the peace of God and this Commonwealth then and there being, felonioufly, wilfully, voluntarily and of their malice aforethought, an aſſault did make, and that he the ſaid Charles M'Manus, a certain piſtol of the value of twenty ſhillings lawful money of Pennſylvania, then and there charged and loaded with gun-powder and a leaden bullet, which piſtol he the ſaid Charles M'Manus in his right hand then and there had and held, to, againſt and upon the ſaid Francis Shitz, then and there felonioufly, wilfully, voluntarily and of his malice aforethought did ſhoot and diſcharge, and that the ſaid Charles M'Manus, with the leaden bullet aforeſaid, out of the piſtol aforeſaid then and there by force of the gun-powder, ſhot, diſcharged and ſent forth as aforeſaid, the aforeſaid Francis Shitz in and upon the right ſide of the head of him the ſaid Francis Shitz, and in the right ear of the ſaid Francis Shitz, then and there with the leaden bullet aforeſaid, out of the piſtol aforeſaid by the ſaid Charles M'Manus ſo as aforeſaid ſhot diſcharged and ſent forth, felonioufly, wilfully, voluntarily and

of his malice aforethought, did ſtrike penetrate and wound, giving to the ſaid Francis Shitz with the leaden bullet aforeſaid, ſo as aforeſaid ſhot diſcharged and ſent forth out of the piſtol aforeſaid by the ſaid Charles M'Manus in and upon the right ſide of the head of him the ſaid Francis Shitz, in the right ear of him the ſaid Francis Shitz, one mortal wound of the depth of four inches and of the breadth of one inch of which ſaid mortal wound the ſaid Francis Shitz from the ſaid night of the twenty-eight day of December in the year aforeſaid until the twenty-ninth day of the ſaid month of December in the ſaid year, at Heidelberg townſhip in the county aforeſaid, and within the juriſdiction of this court did languiſh, and languiſhing did live on which ſaid twenty-ninth day of December, in the year aforeſaid he the ſaid Francis Shitz at the place aforeſaid and within the juriſdiction of this court, OF THE MORTAL WOUND AFORESAID, did die; and that the ſaid Peter M'Donough otherwiſe called Peter M'Donoghy then and there felonioufly wilfully voluntarily and of his malice aforethought was preſent aiding, helping, abetting, comforting aſſiſting and maintaining the ſaid Charles M'Manus the felony and murder aforeſaid in manner and form aforeſaid to do and commit, and ſo the jurors aforeſaid upon their oaths and affirmations aforeſaid do ſay that the ſaid Charles M'Manus and the ſaid Peter M'Donough otherwiſe called Peter M'Donoghy felonioufly wilfully voluntarily and of their malice aforethought, him the ſaid Francis Shitz then and there in manner and form aforeſaid did kill and murder, againſt the peace and dignity of the commonwealth of Pennſylvania and againſt the form of the act of aſſembly in ſuch caſe made and provided &c.

The ſecond count ſtated the killing by ſeveral wounds with an axe.

The third count ſtated the killing to be by the piſtol and the axe; they are unneceſſary to be given at length.

Then followed the count againſt the acceſſaries in the following words:

And the jurors aforeſaid upon their oaths and affirmations aforeſaid reſpectively do further preſent that John Hauer late of the ſaid townſhip of Heidelberg in the county aforeſaid Yeoman, Elizabeth Hauer the wife of the ſaid John Hauer, Patrick Donagan late of the ſame place Labourer,

Hugh M'Donogh late of the ſame place labourer, and Francis Cox late of the ſame place labourer, not having the fear of God before their eyes, but being moved and ſeduced by the inſtigation of the devil, before the felony and murder aforeſaid in manner and form aforeſaid done and committed by the ſaid Charles M'Manus and Peter M'Donogh otherwiſe called Peter M'Donoghy to wit the 27th day of December in the year aforeſaid at the townſhip aforeſaid and within the juriſdiction of this court, them the ſaid Charles M'Manus and Peter M'Donogh, otherwiſe called Peter M'Donoghy to do and perpetrate the felony and murder aforeſaid in manner and form aforeſaid, of their malice aforethought voluntarily, wilfully and felonioufly did incite procure and abet, againſt the peace and dignity of the commonwealth of Pennſylvania, contrary to the laws, and againſt the form of the act of aſſembly in ſuch caſe made and provided, &c.

JARED INGERSOLL,
Attorney-General.

N. B. The indictment preferred at March preceding was in the ſame form as the foregoing—except that the words "OF THE MORTAL WOUND AFORESAID" were omitted.

CHARLES M'MANUS and PETER M'DONOGHY being put to the bar, ſeverally pleaded not guilty—and on the following day—viz. June 13th, Charles M'Manus was tried—the jurors ſworn were:

1. MICHAEL URICH.
2. SAMUEL STURGEON.
3. DANIEL LONGENECKER.
4. HENRY M'CORMICK.
5. OBED FAHNESTOCK.
6. JOHN STONER.
7. JOHN BOYD.
8. JOHN BLATTENBERGER.
9. WILLIAM SNODGRASS.
10. HENRY STONER.
11. JOHN GRAY.
12. SAMUEL FINNEY.

The clerk of Oyer and Terminer read the indictment to the jury. Mr. C. Hall, for the commonwealth, then opened the evidence much at large, as it will appear in the following pages.

Eve Doebler was the first witness sworn on the part of the commonwealth.—She deposed as follows:

I was lying on a bench behind the stove, I had just awakened, and saw a light in the kitchen,—I went out and there was a candle on the dresser—two men were standing by the fire near the dresser; they had their heads bound round with whitish handkerchiefs—they perceived me—and one of them, who had a whitish coat on, looked very angry at me, turned round, and followed me into the room. I took Francis Shitz by the arm, and told him there were some strangers in the house—he was lying on the bench behind the stove asleep. I thought he was just getting up, when a pistol was fired off; the candle went out; some of the blood spirted on my arm. They went out into the kitchen, lighted the candle again, and brought in a wood axe, and cut Francis Shitz four times on the head. I and three boys, Jacob Haverling, John Hoffman and John Doebler ran behind the stove; they attempted to strike us, and advanced upon us with the axe—the candle went out a second time. They went out again and lighted the candle—I ran into the chamber where Peter Shitz was sleeping in bed—I think the three boys went in also—the two men followed us into the chamber, with the lighted candle: they tore down the curtains, and dragged Peter Shitz out of the bed—I do not know how they got out of the chamber, but Peter and they got into the front room—and I ran out of the back door, and got to Shæfer's town, where I told what had happened.

In answer to sundry questions put to her, she said—I did not see the face of one of the men, the other had a long whitish coat on; I cannot certainly say who they were, I was so frightened—the foremost was a little taller than the other. I cannot tell which of them shot the pistol; I thought the one with the whitish coat was the nearest to me when the pistol was shot, and I think, but I cannot be sure, that he held the candle. Their foreheads were tied as low down as their eyebrows. When Francis Shitz was shot, he fell on the floor, near the bench, but he did not speak.—I saw M'Manus the

Saturday evening following at Shitz's house—I thought he looked angry at me like the man did, on the night the murder was committed.

JACOB HAVERLING, (Sworn.)

I was lying on the floor at Shitz's house, behind the stove, the night of the murder, in the same room where Francis Shitz lay.—When the pistol was fired, I awakened and jumped up; the flash almost flew in my face. The candle was blown out by the shot—I ran behind the stove. One of the men came in with the candle, and brought in an axe, and cut Francis Shitz four times on the head with the axe. He had the axe in one hand and the candle in the other. He then ran after me behind the stove, and wanted to strike me. The candle went out again. He went out and lighted the candle again. I went out from behind the stove, and got out of the window, and ran to Mr. Shæfers. I did not go into the room where Peter Shitz lay.—I saw M'Manus the Saturday following, when they brought him to Shitz's house. I can't recollect what sort of a coat he had on the night of the murder—it appeared to be a greyish coat.

(Two axes produced in court.)

These axes belonged to Francis Shitz—it was with one of them he was struck.

LEONARD DOEBLER, (Sworn.)

I found the pistol behind the block in the kitchen, about half an hour after the murder happened. It had a spread Eagle on the but. [A pistol produced and shown to witness.] This is the same pistol. The cock was down, and it appeared to be newly fired. I saw a ram-rod lying in the room, in the blood: and I saw another ram-rod in the kitchen—this last ram-rod was a little LONGER THAN THE OTHER.

PETER SHITZ, (Sworn.)

I knew nothing of it till they came into the room where I had been sleeping. I did not hear the pistol go off.—They caught hold of me in the bed, by the breast, and dragged me forward. I threw one of them down on the floor, in the chamber, and then ran out into the room where Francis lay—

they both followed me out with axes; they both had axes. I took a chair and ſtruck one of them with it. I tried to knock down the other one; he ſtaggered towards the bench. The third time I ſtruck, the chair broke.—I went back into the bed-chamber, and faſtened the door; I then got out of the window; juſt as I was getting out, a pannel of the door was broken in by the axes, and the door fell after it. I ran up to the barn, got up the ſtairs to the overſhot of the barn, and got a pitch fork and ſtood at the head of the ſtairs. I thought they were coming after me—and I ſtood there a little while: But when they did not come, I put the fork by, got out of the back door of the barn, went through the orchard, and ran up to Shæfer's town, to one Neff's houſe. I knocked and Neff let me in. I told him what had happened—they then went down to the houſe, and I ſtaid behind. By this time I was ſo weak I could walk no more, and I laid down on the bed at Neff's. I did not know that I was wounded till I got up to Neff's. I was cut very badly in the arm and on the hip, both of them to the bone, about three inches wide. I do not know who did it. I ſaw no candle when I awakened, and they had hold of me. I heard no voices, except once, one of them ſaid in Engliſh, "God damn your ſoul!" But I did not know the voice.

SAMUEL REX, (Sworn.)

I was alarmed, by my brother in law Michael Valentine, about midnight; he rapped at the door, and told me to get up as quick as I could, and to come down. I looked out of the window, and a boy hallowed to me that the Shitzes were murdered. I went down to the houſe; I ſaw Shitz covered with blood; I do not recollect how he lay; he was on the floor. It was on the night of the twenty eighth of December laſt—about twelve o'clock, or between twelve and one. There was a great quantity of blood, nearly as much as could be taken out of a good clever ſteer; I was ſurprized that a human creature could have ſo much blood; He was lying in it. He appeared to moan very much, particularly when Mrs. Hauer, his ſiſter came. He kept conſtantly waving his right hand back and forward towards his head. When the piſtol was found it was blown into, and the ſmell of the freſh powder came out; I was convinced it had been recently fired. He had four cuts on his head, and his ſcull lay bare. We ſearched for the place where he had been ſhot, but could diſcover no marks of it—and we

doubted a long time if he had been ſhot at all; but the girl perſiſted in it that he was ſhot. Shortly before he died, the doctor diſcovered that he was ſhot in his right ear. We then gave up all hopes of his recovery. He died at 10 o'clock the next morning, (December 29th, 1797.)

JACOB MILLER, (Sworn.)

[*The piſtol which was found in the houſe, produced and ſhown to the witneſs.*] I ſaw this piſtol in the poſſeſſion of Charles M'Manus, eight or nine weeks before the murder happened. He and his brother-in-law John Sweitzer had a falling out: M'Manus had ſtruck Sweitzer, and a ſtate's-warrant had been iſſued againſt M'Manus. I happened to call in, on a Sunday, after the warrant had iſſued, at the houſe of one James Logan. Charles M'Manus and Patrick Donagan were there. I had ſometimes done ſome conſtable buſineſs, and M'Manus ſuſpected I had the warrant—and he ran to his piſtols, which were lying on the table, and cocked one of them, and ſaid Miller ſtand off, or I'll blow your brains out. I aſked him what for; he ſaid, you have a ſtate warrant againſt me. I told him, no, I have not. He ſaid again, yes, you have. I ſaid, no, I have not: and when he found I had not, he got great with me, and gave me a glaſs of whiſkey. I aſked him to ſhow me the piſtols, and he ſhowed them to me. I ſearched if they were charged; they were both charged very well. One was a newiſh piſtol, and the other was an old one: the old one, it ſeems to me, was RATHER LONGER THAN THIS.* I am ſure this is the piſtol which M'Manus had—It had the eagle on the but, and the ſame yellow flower on the barrel.

* See Leonard Dœbler's evidence, that one of THE RAM RODS FOUND WAS LONGER THAN THE OTHER.

EMANUEL CARPENTER, Eſq. (Affirmed.)

Charles M'Manus called upon me the beginning of November laſt, and made a complaint that he catched a man in bed with his wife. I told him he muſt ſwear or affirm to the fact. He ſcrupled to ſwear by the book, and did affirm. I then granted the warrant. Afterwards he walked up and down the room, and after ſome time, he ſaid, Squire, I have ſomething more to tell you; he ſeemed thoughtful: I aſked him what it was. He ſaid there were people laying a plot to murder a man near Shæfer's town. I aſked him whom they were going to murder. He replied, it was one

SHITZ. I ſaid, SHITZ is an old man, who would kill him? I ſtill thought the old man was alive. He then told me it was not the old man, he was dead; it was the young one, his ſon. I aſked him who was going to kill him. His anſwer was "TWO BOYS"—and mentioned he would willingly take a warrant for them people. I aſked him where SHITZ lived. His reply was, that he lived about two miles or ſo beyond Shæfer's town. I told him the man lived in the other county, [Mr. Carpenter is a juſtice in Lancaſter county, but he was certainly overcautious in this inſtance] and I can't do any thing in it. I told him he ought to inform Shitz of it, and let Shitz look for his protection in law—and (I ſaid) you will be his witneſs, if you mean to do an honeſt act, and he is in danger;—he ſaid, I BELIEVE I will. I had known Charles M'Manus a year or better before this.

PHILIP CATTERY, (Sworn.)

I was ſitting at my work, one evening at Manheim, about two weeks before laſt Chriſtmas, in one Philip Bretz's ſhop, working at my trade of ſhoemaking. FRANCIS COX came to me, and told me he had ſomething to ſay to me. I told him I had not time till I had finiſhed my pair of ſhoes: That when I had done, I would go up to his houſe in the evening, and he might tell me what it was then. When I quit my work, I did go up to his houſe, but he was ſettling ſome law buſineſs about ſome partnerſhip affair, which he and Michael Hogan had together, at Squire Enſminger's. I went to Enſminger's—I aſked Cox what he wanted with me. He ſaid he could not tell me till that affair was ſettled. I waited at Enſminger's until the affair was over. Francis Cox and my employer then walked on a rod before; Charles M'Manus and I walked together behind—we all went to Cox's houſe together. On the road Charles M'Manus aſked me to go to ſome town to ſleep at a tavern on ſuch a night; I don't recollect the name of the town—I think it was LEBANON, I am not ſure: Either the firſt or ſecond night after Chriſtmas, I think was what he ſaid; and if I would ſleep there he would give me as much money as would put me from hard work or ſlavery. I aſked him what it was he wanted with me. He told me he would not tell me till I would ſwear an oath upon a book. I told him I would have no call to it, it BE TO BE ſomething that was not right. He ſaid it would not hurt me at all. I went home with my employer. Next day, or two days afterwards, Cox came to the ſhop, where I was ſitting at

my work, and aſked me if I WOULD DO WHAT THEY WERE TALKING OF BEFORE. I told him I would not. I aſked him if he knew what it was—he ſaid not. M'Manus ſaid he was to go out of the houſe in the night, but Cox and me were to ſtay in the houſe.

JACOB GEIGER, (Sworn.)

On the Thurſday evening before new-year, about half an hour before ſun ſet, Francis Cox and Charles M'Manus came to my houſe; they had one creature along. Charles M'Manus aſked me if I had any oats, I ſhould give it to his mare. Cox ſaid, no, I ſhould give her hay firſt. They aſked for half a pint of whiſkey; they aſked to ſtay all night, and wanted ſupper. They got their ſupper. Then three Jerſey men, who were travelling to Jerſey, came, and wanted to ſtay all night. About fifteen minutes before 8 o'clock, Cox and M'Manus aſked to go to bed. I put them up ſtairs in a room where two beds ſtood. I told them they two muſt ſleep together. Cox made anſwer that they HAD SLEPT MANY A NIGHT TOGETHER. They ordered me to bring them half a pint of whiſkey, and ſome water. When I took it up, they wanted me to take a glaſs of it; I told them I would not. Cox drank a glaſs, and aſked Charles M'Manus if he wanted to drink a glaſs. He ſaid, No, in the MORNING. When I came down, I obſerved one of the Jerſey men had boots on; ſo I went back into the room where Cox and M'Manus lay, and fetched a pair of ſlippers down. M'Manus aſked me if them people wanted to go ſoon to bed. I anſwered, yes. The Jerſey men ſoon after went to bed. I put two of them in the ſame room with Cox and M'Manus: the other Jerſey man I put into a bed by himſelf. I then went to blacken the boots: while I was cleaning the boots, I heard my wife talking to M'Manus, outſide of the door of the room, in the kitchen. She told him, I am ſure you need not come down, you have got a pot under your bed. He made anſwer, I want to go out.—He ſtaid a good while; he had no coat on when he went out. My wife got uneaſy at his ſtaying ſo long:—after a while I went out about the houſe and barn, and looked every where, but could not find him. I then went and looked in the bed, and he was not there. I aſked Cox where his comrade was: He anſwered that he complained of the BELLY-ACHE. We then hunted for him a ſecond time, but could not find him. I went up to Francis Cox again, and told him to get up and help me to hunt his comrade. He an-

ſwered, may be he went after the girls; and he would not get up. My wife then wanted me to get ſome of the neighbours to help to hunt for him. I went to one Abraham Meyers, about 50 rods down the road, but could not get him. I was afraid M'Manus had hanged himſelf. I then went to Martin Imhoffs; I could not get him—I went home again. My wife told me to raiſe up the travellers. I told her I was afraid, that I did not like to go to travellers' rooms by myſelf. At laſt I got one Brown, who lived in the houſe, to go up with me, and I wakened the travellers. I told one of the two who lay in the room where Cox was, to lay ſtill, that I was afraid of Cox, he had refuſed to get up to help to look for Charley. When Cox heard that, he got up out of his bed. I went with the candle to Cox's bed, and FOUND Cox's SHOES WERE GONE. I had M'Manus's boots locked up. I ſaw that the whiſkey was drank out. M'Manus's hat and coat lay on the table. Cox TOOK THE SLIPPERS which I had given to Charley, AND PUT THEM ON HIS FEET. We hunted Charley up and down—round the barn, and in the barn, but could not find him. Cox looked a little, but not much. We then went back to the houſe. We kept a candle burning all night. The Jerſey people aſked Cox, where that man (M'Manus) had his home. He anſwered, that he had his home no where. Francis Cox and Brown went to bed again. We had hunted for M'Manus about half an hour, or an hour. My wife ſtaid up a great while; I and the Jerſey people ſtaid up all night. One of the Jerſey people looked at his watch; it was then about 10 o'clock; and we thought M'Manus was dead by that time, as he did not come back. We waited awhile, and looked at the watch, and it was ONE o'clock—and again at 2 o'clock. M'Manus had not yet come back. Awhile after this, Francis Cox came down and ſaid to me, M'MANUS is down there that we had been hunting for; that he threw ſome ſtones upon the roof and wanted me to let him in. We did not hear them. He ſaid he had come down to let him in. Cox then went to the door, opened it, and ſaid, Damn your ſoul, Charley, where have you been, to make us hunt you all night. M'Manus ſaid nothing. We heard him going up ſtairs with ſhoes on, but he did not come into the room where we were. One of the Jerſey men looked at his watch at this time, and it was three o'clock exactly. Next morning the Jerſey people aſked him where he was; he made anſwer, that he was ALONG WITH A WOMAN: that he had made a bargain with a woman out of Lebanon, and ſhe would not come to my houſe, for

fear we ſhould know her, and ſhe made a bargain to meet him at my barn; that he met her there, and they then went to old Imhoff's barn together. The Jerſey men plagued him a good deal about it. He then called for a pin of whiſkey, and wanted breakfaſt. I told him I could not give them breakfaſt, as my wife had gone to bed ſick; but I would give them ſome cold victuals. He aſked to ſee my wife; I went in with him to the room; he offered her £.5 if ſhe would ſtand on her feet. He went in a ſecond time, and told her not to take it ſo hard; that for the price of his little mare in the ſtable he would not that it had happened ſo: that next Sunday he would give her a preſent that was worth £.10—that he had ENOUGH, and could do it without hurting himſelf.

It was a VERY COLD night. It was the ſame night the murder was committed. It is about five or ſix miles from my houſe to where Shitz lived.

Cox rode the mare away the next morning; ſhortly after M'Manus followed him on foot.

MARY GEIGER, the wife of Jacob Geiger, was next affirmed as a witneſs.

She related the circumſtances in the ſame manner as her huſband, it is therefore unneceſſary to repeat them, unleſs where ſhe was ſomewhat more minute and particular. She ſaid:—

That after all the ſtrangers had gone to bed, ſhe had locked the front door, and had gone into her own room to make her bed, and bolted the door with a bolt inſide, that it had no other faſtening. That ſoon after ſhe heard a rattling at the outer door; ſhe unbolted her own door, and ſaw M'Manus ſtanding in the kitchen, at the outer door, with a handkerchief tied round his head, which had a whitiſh appearance—(to uſe her own words.) I am ſure, ſays I, you frightened me. He gave a laugh. Sure, ſays I, you need not have come down, you have got a pot under your bed. He ſaid he wanted to go out; I then unlocked the door. I looked after him, and ſaw a little red ſhining thro' the handkerchief which was tied round his head. He had come to our houſe before, and pretended that he wanted to buy cattle. We hunted him about an hour, Cox helped to hunt, but did not go as the reſt did, and did not SEEM MUCH CONCERNED ABOUT IT.

We kept a lamp burning all night. One can ſee from the outſide, when there is a light in the houſe; the people were all ſitting in the place where the light was, and any one might ſee them thro' the window, from the road.

When M'Manus went out he had nothing on but his ſhirt, a jacket without ſleeves, and his trouſers. He had NO SHOES ON, and I believe no ſtockings. It was very cold that night. He had no bundle in his hand carrying.

When Cox came down to let M'Manus in, he came down very ſoftly without either SHOES OR SLIPPERS on; I did not hear him till he came to the door—We could then ſee that he had no ſhoes or ſlippers on. He then let M'Manus in, and they went up ſtairs together, and we heard M'Manus GOING UP STAIRS WITH SHOES ON, but we did not ſee him, as they did not come into the place where we were.

M'Manus told me the next morning that he could give me a preſent of £.10 and not hurt himſelf, for HE HAD ENOUGH. He ſaid he had been along with a girl.

CHARLES M'MANUS's confeſſions and examinations, being four in number, were then read; but they were lengthy and contradictory: in one of them he had given as a reaſon for his leaving Geiger's houſe, that he had taken ill with a complaint in his bowels, but did not adhere to the ſtory of the girl. In his other confeſſions he declared that John Hauer and Peter M'Donough were the perſons in the houſe and actually preſent at the killing; that he himſelf held their horſes at the end of Hauer's lane, which was admitted to be three quarters of a mile, at leaſt, from the ſcene of action—and ſtrongly denied his having any other hand in it. That Patrick Donagan was the perſon who procured him to have any concern in it; and that they were to have £.1100 for the job. That he once threatened to tell, and actually did inform Squire Carpenter, and a man at Manheim, one Evans, that the murder was to be committed. That he had met Hauer and M'Donough at the Black Horſe tavern, the Sunday before the murder was committed, and the Thurſday night following (28th) was agreed upon for its execution. That M'Donough wanted Cox to go with him, but Cox threatened to tell, and he was then to get £2 or 300 for concealing it.

The above is the ſubſtance of what M'Manus declared, ſome of the examinations were ſworn to—But it is to be much queſtioned if they conſiſt with the truth of the fact in the total, as will be ſeen upon the following trials.

One of the examinations was not ſigned, but was reduced to writing: and Mr. Montgomery, and Mr. Patterſon, who had been aſſigned as counſel for the priſoner, by the court, excepted to its being read, and alſo to the examination of Judge GLONINGER, before whom it was taken, to prove the fact, as it was not ſigned by the priſoner, and that no parole evidence ſhould be allowed—As to his declarations before a magiſtrate or judge, that by the ſtatutes of Philip and Mary, they are expreſſly required to be put in writing; —and the Court heretofore have refuſed ſuch examinations when they have not been ſigned by the priſoner. They cited Fireman & Henwell. Hardw. ca. 306, where an examination upon oath, in writing, ſigned by the Mayor before whom it was taken, but not by the witneſs, was offered in evidence. That Lord Hardwicke would not let it be read, *for no examination ſhall be read, unleſs ſigned by the party.*

The counſel for the commonwealth ſaid they were very indifferent about the admiſſion of the evidence: it was merely to ſhow how much he had varied in his different relations, at the different times, and how little reliance was to be placed upon his confeſſion as to the actual ſhare he himſelf had in the diabolical act. That there was ſufficient evidence without it. That it could not, however, be refuſed upon the reaſons given. The caſe in Hardwicke was the caſe of a depoſition of a witneſs in a cauſe, which muſt always be ſigned by the party—that that was not a caſe within the contemplation of the ſtatutes of Ph. & Ma. That thoſe ſtatutes not only did not require the examinations to be *ſigned*, but they did not even require them to be *put in writing* at the actual time of taking them. The words are "That juſtices "of peace when any priſoner is brought before them on a charge of felony, "*ſhall* take the examination of the ſaid priſoner, and the information of "them that bring him, of the fact and circumſtances thereof; and the ſame, "or as much thereof as may be neceſſary to prove the felony, *ſhall* be put "in writing *within two days* after the next examination, and certified to the "next general Goal Delivery." Stat. 1 & 2. Phil. & Ma. c. 13. ſ. 4. and 2 & 3 Ph. & Ma. c. 10.

HENRY, *Preſident.* I do not recollect how the Court may have decided heretofore: The caſe in Hardwicke may at one time have induced an opinion that the examination ſhould be ſigned as well as reduced to writing; but the Court have conſidered the ſubject, and they have no doubt at all about it. The caſe in Hardwicke does not apply to the queſtion; it is not the caſe of the examination of a felon, but the depoſition of a witneſs; the language of the Statutes is very plain, and they do not require the examination to be *ſigned* by the party. Let it be read. See Leach's caſes in the Cr. Law, 2d edition, 184, 254, 286–7. 2 Hawk. c. 15. ſ. 59. and c. 16. ſ. 11.

The priſoner called but one witneſs, who proved nothing material for him.

PETER LIVERGOOD, (called by the priſoner) Sworn.

Charles M'Manus worked with me a while towards laſt fall. Peter M'Donough borrowed a piſtol from me, he ſaid he wanted it to ſtrike a fire to blow rocks with. Charley M'Manus and he were working together. Peter M'Donough returned the piſtol to me again. I lent but one piſtol:—*it was an old one, a little longer than this here.* [Pointing to the piſtol found in the houſe.] Charles M'Manus never borrowed any piſtol from me.

COUNSEL for the PRISONER.

We have no deſire to addreſs the jury. We think, however, that the whole of the confeſſions ſhould be taken together, and not apart only; and by them it will appear that M'Manus was not preſent at the murder, but nearly a mile diſtant; that of courſe he could not be convicted on this indictment, but ought to be conſidered merely in the light of an ACCESSARY BEFORE THE FACT.

COUNSEL for the COMMONWEALTH.

We wiſh the gentlemen would addreſs the jury, if they are able to ſay any thing in the priſoner's behalf; we ſhall then be able to anſwer them; that this mode of proceeding could anſwer no purpoſe. That as to the circumſtance of taking his confeſſions all together, that was impoſſible—they were ſo variant and contradictory, they could not be reconciled. We, on the other hand, have given the ſtrongeſt evidence to induce a belief that his ſtory is not true; but that he was one of the men who were actually IN the houſe the

night of the murder. But putting it upon the gentlemen's own ground, it would make no difference as to the reſult, but the priſoner muſt be convicted even upon his own confeſſions; for it is not neceſſary he ſhould be the very perſon who fired the piſtol, or ſtruck the ſtroke, nor even that he ſhould be an eye or an ear-witneſs; if in any other way he was aiding the general deſign, though at a diſtance off, it is a ſufficient preſence, to make him a principal. In Foſt. 349. ſ. 4. it is ſaid, "When the law requireth the preſence "of the accomplice at the perpetration of the fact, in order to render him a "principal, it doth not require a ſtrict actual immediate preſence, ſuch a "preſence as would make him an eye or an ear-witneſs of what paſſeth.

"Several perſons ſet out together, or in ſmall parties, upon one common "deſign, be it murder ot other felony, or for any other purpoſe unlawful in "itſelf, and each taketh the part aſſigned him; ſome to commit the fact, "others to watch *at proper diſtances and ſtations* to prevent a ſurprize, "or to *favor*, if need be, the *eſcape* of thoſe who are more immediately en-"gaged. They are all, provided the fact be committed, in the eye of the "law, preſent at it. For it was made a common cauſe with them, each "man operated in his ſtation at one and the ſame inſtant towards the ſame "common end; and the part each man took tended to give countenance, "encouragement and protection to the whole gang, and to enſure the ſucceſs "of their common enterprize." And again, in pa. 351. ſ. 6. it is further ſaid, that "in combinations of this kind the mortal ſtroke, tho' given by one "of the party, is conſidered in the eye of the law, and of ſound reaſon too, "as given by every individual preſent and abetting. The perſon actually "giving the ſtroke is no more than the hand or inſtrument by which the "others ſtrike.

"And therefore where the indictment chargeth, that A. gave the mortal "ſtroke, and that B. and C. were preſent aiding and abetting; if it cometh "out in evidence that B. was the perſon who gave the ſtroke, and that A. "and C. were preſent aiding and abetting, they may be all found guilty of "murder or manſlaughter at common law, as circumſtances may vary the "caſe. The identity of the perſon ſuppoſed to have given the ſtroke is but a "circumſtance, and, in this caſe, a very immaterial one; the ſtroke of *one* "is in conſideration of law the ſtroke of all." So that in which ever point

of view the evidence may be conſidered by the jury, they muſt convict the priſoner.

The Court expreſſed their opinion very deciſively that it could not poſſibly make any difference; and that if the fact was even believed by the jury, that M'Manus was not in the houſe, but at the end of the lane, with the horſes, ready to aſſiſt the perpetrators of the deed in their eſcape or flight, he was equally guilty with them, and ought to be convicted on this indictment; the fact of the killing being ſtated in the indictment, to be done by M'Manus, being a mere circumſtance, and no ways material.

The Counſel for the priſoner therefore declined ſaying more; and the matter appearing ſo plain, the Counſel for the Commonwealth did not addreſs the jury.

THE PRESIDENT in his charge went into a particular detail of the evidence: He told the jury that if one circumſtance had turned up favorable to the priſoner, he ſhould have thought himſelf bound to have given it its full force; but that no favorable circumſtance had occurred which could induce them to heſitate a moment reſpecting the guilt of the priſoner. He alſo told the jury, that by a late act of aſſembly, they muſt aſcertain in their verdict, if they found the priſoner guilty, whether he was guilty of murder in the firſt or ſecond degree. That from the circumſtances in this caſe it was unqueſtionably murder in the firſt degree.

The jury retired from the bar, and in about an hour, returned with a verdict that Charles M'Manus was GUILTY OF MURDER IN THE FIRST DEGREE, which was ſo recorded.

PRESIDENT OF THE COURT.

Charles M'Manus; On Tueſday next the Court will paſs ſentence on you. If you have any thing to move in arreſt of judgment, we will then hear you.

Priſoner remanded.

The reſt of the priſoners were then ordered to the bar to be arraigned as acceſſaries before the fact.

Clerk of Oyer and Terminer read the indictment.

Clerk. How ſay you, PATRICK DONAGAN, are you guilty of the felony whereof you ſtand indicted, or not guilty?—

Priſoner. Not guilty.

Clerk. How will you be tried?—

Priſoner. By GOD and my Country.

Clerk. GOD ſend you a good Deliverance.

The ſame form as to the other priſoners, except as to JOHN HAUER.

Clerk. How ſay you, JOHN HAUER, are you guilty of the felony whereof you ſtand indicted, or not guilty?—

Priſoner ſtood mute.—

Mr. DUNCAN. The counſel for the priſoner feel conſiderable difficulty as to the mode of bringing forward an application to the court on his behalf; they therefore claim the indulgence of the court. They are ſatisfied the court will be ſo far of counſel for the priſoner as not to ſuffer him haſtily to be ſurprized into a plea, which may operate to his injury. JOHN HAUER was indicted at the laſt court as a principal. He was then arraigned, pleaded —a jury ſworn, teſtimony given, and afterwards that jury diſcharged without giving a verdict. We contend that after ſuch diſcharge, he can never again be put upon his trial for the ſame offence. This new indictment is, in fact, for the ſame offence. The offence of a principal and of an acceſſary *before* the fact, are ſubſtantially the ſame; and if one is acquitted as principal, he can not be indicted again as acceſſary *before* the fact. We ſhall, *firſt*, ſhow the court, that no law is better ſettled than this; and, ſecondly, we will contend that a jury once diſcharged in a capital caſe, amounts to an acquittal of the priſoner, and he cannot be put a ſecond time upon his trial for the ſame offence. Our motion, therefore, will be, upon this ground, that JOHN HAUER be not put *to plead* to this indictment, but that he be *diſcharged therefrom.*

In 1. Hale 626. it is expreſsly laid down, that if A. be indicted as principal and acquitted, he ſhall not be indicted as acceſſary BEFORE, and if he be, he may plead his former acquittal in bar, for it is in ſubſtance the ſame offence, *Stamf.* P. C. lib. 2. *cap.* 36. *fol.* 105. a. 2 Ed. 3. *Coron.* 150 & 282. But the antient law was otherwiſe. 8 Edw. 2. *Coron.* 424. In *Ke. lynge* 25-6. This doctrine is, upon conſideration of the books, agreed to be the law. It is true, this caſe goes farther, and upon a doubt being ſuggeſted whether, if the priſoner ſhould be acquitted as principal, he could be afterwards indicted as acceſſary BEFORE the fact; to avoid this doubt, the court diſcharged the jury of him, and ordered another indictment to be againſt him as acceſſary. We are, however prepared to ſhow that this latter point is not the law, but that it has been long ſince exploded. This caſe muſt certainly be determined upon principle and precedent, and not on the chamber opinions and ſpeculative reaſoning of any judge, however reputable and learned. The gentlemen mean to rely greatly upon *Foſter*— yet even Judge Foſter lays it down, that one acquitted as principal cannot be indicted as acceſſary BEFORE; he ſpeaks of it as a ſettled point; and although he finds fault with the principle, and throws out his doubts for the opinion of the learned, yet this cannot control what is admitted to be the law of the land. So in *Hawkins* chap. 35. ſ. 11. this is ſaid to be holden to be the law in many books of good authority: Sir *Wm. Blackſtone* ſtates it in the ſame way, as a ſettled point. What authority have we in oppoſition to theſe ſentiments of *Hale* & *Foſter*, of *Hawkins* & *Blackſtone*? or how can a doubt remain as to the law upon this point? It ſtands uncontroled by any judicial deciſion. Then, if the priſoner be indicted for an offence of which an acquittal on the former indictment might have been pleaded in bar; we contend that the diſcharge of the jury upon that trial has the ſame operation. This is the ſame offence for which JOHN HAUER was indicted at the laſt court, and he cannot be twice put in JEOPARDY for it. We will ſhow that the court have not the power to diſcharge the jury, after the evidence, for any thing that appears on the record, was all gone through on the part of the commonwealth. If the contrary doctrine could be ſupported, then the life of a priſoner might be put in JEOPARDY as often as the proſecutor might think fit, either for the purpoſes of oppreſſion, or becauſe he might not have evidence ſufficient to convict. Even in a civil action a jury cannot be diſcharged without conſent, whatever may be the juſtice of the caſe. Shall

we be leſs tenacious of the principle where the life of a man is at ſtake? We admit that caſes of *neceſſity* may exiſt, in which the court muſt unavoidably diſcharge the jury—The caſe of a juror dying is one of them; what elſe in ſuch caſe could be done? So, from motives of humanity to the priſoner, as where a woman was ſuddenly taken in labor in the courſe of the trial. But the general doctrine is fixed, that a jury once charged in a capital caſe cannot be diſcharged without giving a verdict.

The authorities upon which we rely are numerous and ſtrong. In 1. Inſt. 227.¶ Lord Coke ſays, that a jury ſworn and charged in caſe of life or member, cannot be diſcharged by the court or any other, but they ought to give a verdict. So in *Carthew.* 465. this caſe occurs—*Nota, per* Holt, Chief Juſtice, at the ſittings in Westminster, 9. Nov. 1698, in a caſe of perjury tried before him, between the King and Perkins, he ſaid, that it was the opinion of all the Judges of England, upon debate between them.

1. That in capital caſes a *juror cannot be withdrawn*, tho' all parties conſent to it.

2. That in criminal caſes, not capital, a juror may be withdrawn, if both parties conſent, but not otherwiſe.

3. And that in all civil cauſes, a juror cannot be withdrawn, but by conſent of all parties.

And in 2. Stra. 984. in the caſe of the King and Jeſſs, who was indicted for Barratry;—the proſecutor could not go on for want of a copy of ſeveral proceſſes, after he had given ſome ſtrong proof. Whereupon it was inſiſted to withdraw a juror, as it was done laſt term on an indictment againſt the ſcavengers of St. Giles', for not paying money according to a juſtice's order; and there being ſome unpreparedneſs, Mr. Abney, one of the king's counſel, conſented to withdraw a juror.

The Chief Juſtice at firſt inclined to it, but upon conſideration held, there was a difference between that caſe, which may be compared to caſes of a civil nature, and this, where the puniſhment may be infamous, as the

pillory; and for that reaſon it has never been done in perjury or forgery. And therefore he refuſed it in this caſe.

Among the firſt caſes which appear in the books, where the court undertook to diſcharge the jury, is the remarkable caſe of *Whitebread & Fenwick*, 31. Car. 2. 1679. They were indicted for high treaſon together with three other Jeſuits, and upon being arraigned, they objected that they had already been tried for the ſame facts, a jury charged with them, and the evidence found inſufficient, and then the jury diſmiſſed without giving a verdict; and they apprehended they could not be put in JEOPARDY of their lives a ſecond time for the ſame cauſe; that they ought, at the former trial, either to have been condemned or acquitted—This was certainly an objection of great weight: for every priſoner with whom a jury is charged in capital caſes, ought either to be acquitted or convicted at that time—elſe, inſtead of one trial, a man may be made to undergo twenty trials for the ſame fact, when the court find the evidence againſt him defective. The court, however, anſwered, that it was in their diſcretion, to diſcharge the jury without taking a verdict, where witneſſes were wanting, or where there was any accident of the like nature. It is to be hoped that the Counſel for the Commonwealth would not wiſh to rely upon a caſe ſtrongly marked with oppreſſion and injuſtice. Yet upon this caſe, and ſome others, in the ſame arbitrary and corrupt reign, even Lord Hale, great and good as he was, ſeems to have grounded his opinion of the law, that the court may, under the circumſtances he mentions in his 2d vol. 295-6, diſcharge the jury of the priſoner, and remit him to gaol for further evidence; and that it had been ſo practiced in moſt circuits of England. The learned editor of this valuable work, does not, however, ſeem to concur in opinion with the text; for, in a note upon this very point, he combats the doctrine with much force, and mentions, that it hath been ſince holden for law, that a jury once charged in a capital caſe, cannot be diſcharged till they have given their verdict, and the caſe of Whitebread was thought a very extraordinary one: and Mr. Foſter, in his report, pa. 30. hopes that it never will be a queſtion again, whether in a capital caſe, the court may, in their diſcretion, diſcharge a jury after evidence given and concluded on the part of the Crown, merely for want of ſufficient evidence to convict; and in order to bring the priſoner to a ſecond trial, when the Crown may be better prepared:—That this was

done in the caſe of Whitebread and Fenwick, and it was certainly a moſt unjuſtifiable proceeding. I hope, he adds, it will never be drawn into example. This caſe, therefore, by the concurring ſentiments of all modern Lawyers, appears to be entirely exploded. How is the caſe of JOHN HAUER to be diſtinguiſhed from the caſe of Whitebread and Fenwick? He was indicted before, for an offence ſubſtantially the ſame as the preſent—the ſame murder; he pleaded not guilty; a jury was ſworn and charged with him; the whole of the evidence, for any thing that appears upon the record, gone through on the part of the Commonwealth; and then, for want of ſufficient evidence to convict, the jury was diſcharged without his conſent or concurrence, or without any reaſons for it appearing upon the record; and he is now brought a ſecond time to trial, upon a new indictment, for the ſame crime. If this is legal, we ſhall again ſet up the caſe of Whitebread and Fenwick, and the moſt unjuſt and oppreſſive conſequences muſt follow from the doctrine. Shortly after the caſe of Whitebread and Fenwick, we find the Judges diſſenting from the doctrine; and in the caſe of the Lord Delamere, who was tried for high treaſon, 1. Jac. 2. 4 State trial, 258. upon a queſtion put to them by the Lord High Steward, they unanimouſly declared, that *where the trial is by a jury, there the law is clear, the jury once charged, can never be diſcharged, till they have given their verdict, this is clear.* So in Ambroſe Rookwoods caſe. 8 Wm. 3. The Judges refuſed to diſcharge the jury, once ſworn and charged, to let in exceptions upon a new act of Parliament. 4 State Trial, 664, &c. The general doctrine is recognized in 21 Vin. 343. 478. and in 2 Hawk. chap. 47. ſect. 1. it is ſaid to have been anciently an uncontroverted rule, and hath been allowed, even by thoſe of the contrary opinion, to have been the general tradition of the law, that a jury ſworn and charged in a capital caſe, cannot be diſcharged (without the priſoner's conſent) till they have given a verdict; and notwithſtanding ſome authorities to the contrary in the reign of King Charles 2d. this hath been holden for clear law, both in the reign of King James 2d. and ſince the revolution. The caſe of the two Kinlock's is reported in 1 Wilſ. 157. Wright. J. inſiſted ſtrongly that no man can be twice put upon the trial of his life for one and the ſame crime, NOT EVEN BY HIS OWN CONSENT. And, the reporter adds, Upon the report of this matter to the King, his Majeſty was graciouſly pleaſed to pardon Kinloch, *ut audivi.*—The authority of Sir William Blackſtone, is alſo expreſs to the point. He

tells us, 4 Black. 360. that, when the evidence on both sides is closed, and indeed when any evidence is given, the jury cannot be discharged (unless in cases of EVIDENT necessity,) till they have given in their verdict. What, then are these cases of necessity? For if the present falls within any of the excepted cases in the books, we are content that the prisoner should undergo another trial. But if it does not, we hope that in Pennsylvania there can be no difficulty how the Court will decide. And altho' the prisoner should be loaded with crimes—altho' we should look upon him with the utmost abhorrence; yet, it is the law of the land that is to be dealt out to him; and if by that law he is, under the circumstances which have happened, intitled to his discharge, the court cannot hesitate to discharge him. The case of the two Kinlocks rests upon ground peculiar to itself—and affords no authority in the present case. Judge Foster, in giving his opinion, considered that case singly as it stood upon the record, and threw out every consideration that was foreign to it. Let us then consider the present case as it appears upon the record. Not a single reason for the discharge of the jury appears upon this record; but as it stands, it must be taken for granted, that the whole evidence was concluded on the part of the Commonwealth: and that there not being sufficient to convict the prisoner, the Court discharged the jury of him, in order to bring him to a second trial when the Commonwealth might be better prepared. Nothing appears to the contrary of this. The record cannot now be altered; we cannot have recourse to our memory as to what passed. The entry is only "*that, on motion of the Counsel for the Commonwealth, the Court discharged the jury from giving any verdict.* There was no consent or concurrence of the prisoner; nor does any motive appear for the proceeding. This then is exactly the case of Whitebread and Fenwick which has been so justly exploded. We may observe how cautious they were in the case of the Kinlocks to put every thing upon the record; and the nine judges who determined it, did it upon the peculiar circumstances of the case. The only question there was, "Whether in a capi-
"tal case, where the prisoner may make his full defence by counsel, the
"Court may not discharge the jury upon the motion of the prisoner's coun-
"sel, and at his own request, and with the consent of the Attorney-General,
"BEFORE EVIDENCE given, in order to let the prisoner into a defence,
"which, in the opinion of the Court, he could not otherwise have been let
"into"—and all this was regularly entered, and *appeared upon the record.*

It was out of humanity to the priſoner, and by his own *expreſs conſent, and before any evidence was given* on the part of the Crown. It was not the queſtion, whether a jury may be diſcharged after evidence given, in order to the preferring a new indictment better ſuited to the nature of the caſe; where through the ignorance or colluſion of the officer, or the miſtake of the proſecutor, the fact laid varieth from the real fact, or cometh ſhort of it in point of guilt. Nor—whether in a capital caſe, the court may, in their diſcretion, diſcharge a jury after evidence given and concluded on the part of the Crown, merely for want of ſufficient evidence to convict, as was done in the caſe of Whitebread and Fenwick: but the Court cautiouſly confined themſelves to the peculiar circumſtances of the caſe then before them, and left every other point undecided. This caſe, therefore, not being the caſe before the court, is there any other caſe which will help out the Commonwealth? For we hope we ſhall not go beyond decided caſes. Let them ſhow us, if they can, any other caſe, beſides Whitebread and Fenwick's caſe, where the Court did diſcharge the jury without the priſoner's conſent, or without an irreſiſtible neceſſity. The caſe of Elizabeth Meadow, Foſt. 76. was a caſe of extreme neceſſity, and the principles of humanity could not permit the trial to proceed. Foſt. 327-8. is not a decided caſe; it is the ſingle extra-judicial opinion of a ſpeculative writer, and ought not to have any influence in deciding this point againſt the authorities oppoſed to it. We have endeavored to bring before the court every caſe, on either ſide, which we had in our power—We will ſhow one more, in order to ſhow the extent that the Court may go, and the ground upon which only they ought to exerciſe a diſcretion in ſuch caſes. The caſe is the KING & GOULD, 2 Burn's J. 16th edi. pa. 718. "The defendant was indicted for murder—"the jury were ſworn, and part of the evidence given, but before the trial "was over, one of the jurymen was taken ill, went out of court with the "Judge's leave, and preſently after died. The Judge *doubting* whether he "could ſwear another jury, diſcharged the eleven, and left the priſoner in "goal. The Court was moved for a writ of HABEAS CORPUS to bring up "the priſoner that he might be diſcharged, *having been once* put upon his "trial. This being a new caſe, the Court ſaid they would adviſe with the "other Judges upon it; and afterwards they all agreed, that the priſoner "might be tried at the next aſſizes, or the Judge might have ordered a new "jury to have been ſworn immediately." This caſe happened as low down

in 4 Geo. 3. and yet we find the Judges *hesitating*, even in a case of so remarkable a necessity, when the jury by no possibility could give a verdict, whether the prisoner could be put upon his trial a second time.

But whatever the law of England may have been; however it may have varied from time to time, according to the caprice of Judges, under the influence of the Crown, in an arbitrary and corrupt reign; and again fluctuated when the Judges have been more virtuous, and more regardful of the law of the land. The framers of the Constitution of Pennsylvania seem to have intended to put this matter at rest. In the 9th article of that Constitution, "that the general, great, and essential principles of liberty and free government may be recognized and unalterably established, they declare," &c. and in the 10th section of this article, one of those *unalterable* principles they declare to be, that—"no person shall, for the same offence, be twice put in jeopardy of life or limb." When the Constitution of the United States was adopted, it was made an exception by some of the states, that this essential principle was not carried into it; it was deemed a necessary barrier against oppression from the government, and to defend the liberty of the citizen. Accordingly it was afterwards declared, and made part of the Constitution, by the 7th article of the amendments, that "no person should be subject, for the same offence, to be twice put in jeopardy of life or limb."—This, then, as well as the Constitution of Pennsylvania, is the SUPREME LAW OF THE LAND. The Constitution of England is not a written one—They may modify, they may shape it, from time to time, as they may think will best answer the ends of public justice, or of party. But here the Constitution cannot be altered or modified. The courts are bound by it: They cannot step over it: They have it not in their power to violate a single article of it. It limits the very powers, not of the Judges only, but of the Legislature itself.—The court cannot say, as they may heretofore have said in England, the Commonwealth has not been ready; there is not sufficient evidence to convict; we will discharge the jury, and bring the prisoner to trial again, when the commonwealth is better prepared. No—we will set our foot on the line of the Constitution, and can confidently say, that the Court *have not the power to do it at all.*

To conclude. The offences are ſubſtantially the ſame. An acquittal of the priſoner as principal would operate to diſcharge him as acceſſary *before* the fact. The power of the Court, if they have it at all, has been exerciſed illegally in this caſe; it could not be done, but by *withdrawing* a juror, with the priſoner's conſent.—The jury was diſmiſſed by the Court, and no reaſons appear on the record for it. We therefore hope and truſt, that the Court will diſcharge JOHN HAUER from this indictment.

C. HALL & C. SMITH } FOR THE COMMONWEALTH.

If the counſel for the priſoner have really conſidered this queſtion as of moment, and that the reſult may prove advantageous to their client, we feel happy that they have had a patient hearing. They may conceive that the life of JOHN HAUER depends upon the deciſion of this point; and under this impreſſion, they may deem it an indiſpenſible duty to urge it, on his behalf, with all the force of their ingenuity. Should they fail, they will at leaſt feel a ſatisfaction in having left nothing undone, which poſſibly might, in the event, prove beneficial to the priſoner at the bar.

It is true this motion is ſingular in its form. In the outſet, without any plea in bar, by which they would be bound to ſhow the record of *autrefoits acquit*, it is a new mode to ſtop the progreſs of the trial. They ſhould at leaſt, we ſuppoſe, bring the facts before the Court, by ſome plea, before they would be intitled to be heard. If however, the Court are ſatisfied, we have no objection to follow the gentlemen in this way, expecting it will ſave the trouble of going over the ſame ground in another form.

JOHN HAUER was indicted at the laſt Court, as a principal in the murder of FRANCIS SHITZ; a jury was ſworn and charged with him; a part of the evidence was given; but the priſoner thought proper to make a full confeſſion to two of the Judges, criminating himſelf as an ACCESSARY BEFORE the fact, and ſtrenuouſly denying his being the principal murderer. It was in conſequence of his OWN ACT, therefore, that the jury were diſcharged, on motion of the counſel for the Commonwealth, in order that a new indictment might be found, better ſuited to the truth of the fact. It would

have been improper to have proceeded in the trial to give the prisoner, manifestly guilty by his own confession, a chance of escaping. It would have been injurious to the public justice of the country. A new indictment has been accordingly found; and the prisoner's counsel now contend, that he ought not to be put to plead; that the former jury ought not to have been discharged of him without giving a verdict; and that no man can be twice put in JEOPARDY for the same offence. We on the other hand, hope to satisfy the Court, that what has been done, has been done rightly; that it would be a disgrace to the law, if under the peculiar circumstances of this case, the Court had not, for the purposes of public justice, the power they have exercised. We hope that at this day it cannot be made a question.

Before we proceed, we beg leave to observe upon the concluding part of the lengthy argument we have just heard. It has been endeavored, from what motives we know not, to treat this as a constitutional question, as if we did not regard the rights of our fellow citizens equally with the counsel for the prisoner. In fact, the Constitution has nothing to do with the matter before the Court. It is the construction of the principle the gentlemen rely upon, that is to be looked to. The very principle itself was not first known in this country; we borrowed it from the English law; we inherited it as our birth right from a country where civil liberty is as highly regarded as in any country upon earth. That NO MAN SHALL BE TWICE PUT IN JEOPARDY OF LIFE OR LIMB, for the same offence, is as old as the English law, and was well calculated to protect the subject from the oppression of the crown. It is, as it were, the MAGNA CHARTA of the criminal law. We must therefore understand the meaning of rules and terms, before we undertake to argue from them; and the construction given to this rule in the country from which we derived it, and where it has always been well understood, must guide us upon this occasion; and we hope to satisfy the Court that it does not stand in our way.

We will readily agree that a jury ought not to be discharged without the prisoner's consent, merely because there is not sufficient evidence to convict him upon that indictment, and in order to procure more full proof at a subsequent trial, as was done in the case of Whitebread and Fenwick, which we hope, with Judge Foster and the Counsel for JOHN HAUER, may never

again be drawn into example. But that the Court under no circumſtances, even where the purpoſes of public juſtice require it, and where without the exerciſe of ſuch a diſcretion, the moſt atrocious offender muſt eſcape, to the diſgrace of the law, have ſuch a power, is what we cannot accede to. For where, either through the ignorance or inattention, or by the miſtake of the priſoner, a bill is ſent up, charging one grade of crime, and it turns out upon the evidence that the priſoner is guilty of another grade of the ſame crime; there is no caſe which ſays the jury ſhall not be diſcharged, that a new bill may be ſent up, adapted to the facts and circumſtances attending the commiſſion of the crime. If the Court have the power at all, they muſt judge of the occaſion when to exerciſe it. It cannot be confined to one caſe in particular, but muſt depend upon the neceſſity which at any time may require it.—But the circumſtances being as they are in this caſe, how ſtand the authorities? An attentive conſideration of them may throw clear light upon this ſubject. It is true, and the rule ought never to be violated, that where a man is once fairly ACQUITTED upon any indictment, he may PLEAD ſuch acquittal in bar of any ſubſequent accuſation for the SAME CRIME. This plea, ſays Judge Blackſtone, 4 Black. 335, is grounded on this univerſal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the ſame offence. But then he muſt be found NOT GUILTY on an indictment FREE FROM ERROR, and WELL COMMENCED before a Court which has juriſdiction of the cauſe. 2 Hawk. chap. 35. ſect. 1. For if his life was never in JEOPARDY—as where he is acquitted upon an ILL indictment, upon which he could not have been convicted, or if convicted could not have been puniſhed, the plea of *auterfoits acquit, or convict*, is no bar to another indictment. Theſe caſes ſhow the force and extent of the principle the counſel for the priſoner ſo ſtrongly rely upon, and how it ought to be applied; and to apply it in any other way, would be to render it as a ſanctuary for enormous offenders, and not a protection from oppreſſion. 2 Hawk. chap. 35. ſect. 3-8.—2 Hale, 247-8.—Foſt. 26. Rookwood's caſe there cited.—6 Mod. 168.—3 P. Wms. 480-481. The priſoner muſt be *legitimo modo acquietatus*; and he muſt take advantage of it by plea in bar, *auterfoits acquit*, and he muſt be ready to produce the RECORD of his former acquittal. 2. Hawk. chap. 35. ſect. 2. For nothing but an acquittal by verdict on the general iſſue, finding the defendant INNOCENT, will bar another indictment,—NO OTHER DISCHARGE

of an indictment will do. 2 Hawk. chap. 35. ſect. 6. But ſuch acquittal does not exiſt in this caſe; the priſoner was diſcharged from that jury for the very purpoſe of preventing him from pleading *auterfoits acquit*; and we are now to know whether that was done legally or not. But if he had even been acquitted upon that indictment, it would not have availed him; becauſe the indictment is materially defective; and if he had been convicted, he never could have been puniſhed upon it. It is not ſtated that Francis Shitz, died of the wound received. The words are, "of which ſaid mortal wound he "the ſaid FRANCIS SHITZ from the night of the ſaid 28th December in "the year aforeſaid until the 29th day of the ſaid month of December in the "ſaid year, at Heidelberg townſhip in the county aforeſaid, and within the "juriſdiction of this court did languiſh, and languiſhing did live, on which "ſaid 29th day of December in the year aforeſaid, he the ſaid Francis "Shitz, at the place aforeſaid, and within the juriſdiction of this Court, did "die"—omitting the words, "OF THE MORTAL WOUND AFORESAID"—which omiſſion is ſupplied in the new indictment; but the defect runs thro' all the counts of the firſt indictment. Now, however abſurd this objection may appear to the grammarian, yet if the law requires this technical preciſion, there is an end of the preſent queſtion; this objection alone is deciſive—all the precedents warrant this objection;—and ſo is 2 Hale, 247-8. Vaux's caſe expreſſly decided in 4 Rep. 44-5. and in 2 Hawk. chap. 25. ſect. 60. it is ſaid, that no indictment of death can be good without an expreſs allegation, that the deceaſed both received the hurt which is laid as the cauſe of his death, and alſo that he DIED of the hurt ſo received; and the want thereof cannot be made good, by any implication whatſoever. And in the ſame book, chap. 23. ſect. 82. Vaux's caſe is cited to have been reſolved, That an indictment ſetting forth, That I. S. perſuaded the perſon deceaſed to take a certain poiſonous potion under a notion of a medicine, and that the deceaſed, *neſciens prædict' potum cum veneno fore intoxicatum, ſed fidem adhibens dictæ perſuaſioni dicti I. S. recepit et bibit*, is inſufficient, becauſe it doth not expreſſly ſay, that the party received and drank the poiſon; and it was alſo reſolved, that the want of ſuch certainty is not ſupplied by theſe words immediately following, *per quod idem N. immediate poſt receptionem veneni prædicti per tres horas immediate ſequentes languebat et obiit &c.* And yet there cannot well be a ſtronger implication that the poiſon was taken and drank by him; for it being the STRICT RULE of law in theſe caſes to have

the ſubſtance of the fact expreſſed with preciſe certainty, the Judges will ſuffer no argumentative certainty whatſoever to induce them to diſpenſe with it. For if they ſhould once be prevailed with to do it in one caſe, the like indulgence would be expected from them in others nearly reſembling it, and then in others reſembling thoſe, and no one could ſay where this might end; which could not but endanger the ſubverting one of the moſt fundamental principles of the law, by giving room to Judges by arguments from what the jury HAVE found, to convict a man of a fact which they HAVE NOT found. (Vide, Fitzg. 263), and in the 83d ſect. of 2 Hawkins, it is further laid down, that the count ought expreſſly to ſhow that the party died of the hurt ſpecially ſet forth; and it hath been reſolved, that an indictment ſetting forth that the defendant choaked the deceaſed, *qua ſuffocatione obiit*, inſtead of *de qua ſuffocatione*, &c. is erroneous, 1 Roll's Rep. 137. 2 Inſt. 318.—and in Long's caſe, 5 Rep. 122*b*. the defendant was indicted for diſcharging a gun upon Long, "*dans eidem Henrico Long mortale vulnus*," and doth not ſay *percuſſit*, for which reaſon the indictment was held inſufficient; becauſe in all indictments for murder, they ought expreſſly to allege a ſtroke given, and they ſhall not be ſupplied either by argument or any intendment whatſoever. S. C. cited 3 Mod. 202. It is therefore evident, from theſe authorities, that the firſt indictment was ſo materially defective, that if the priſoner had been convicted, he never could have been executed upon it. The Court muſt, upon motion have *quaſhed* it, and the Attorney General has entered a *nolle proſequi* upon it before he ſent this ſecond indictment to the grand jury.

But let us conſider the two points made by the priſoner's counſel, in the order they have made them, and whether either of them can be of avail.—

Lord Hale does indeed lay it down as the law, that one indicted as principal and acquitted, ſhall not be indicted as acceſſary BEFORE, and if he be, he may plead his former acquittal in bar, for it is in ſubſtance the ſame offence—but the antient law was otherwiſe. 1. Hale 626. and this ſeems to be admitted in Kel. 26. But notwithſtanding this weighty authority, it may reaſonably be doubted whether it is found law, or can be ſupported upon principle. It certainly is not an uncontroverted point, but remains ſtill open for judicial deciſion, whenever the caſe ſhall be fairly brought before the Court. And when the counſel for the priſoner reſt upon Hawkins, Foſter

and Blackſtone as confirming this doctrine, they reſt upon an unſolid foundation; for as far as the doubts of theſe great and truly learned men can do it, they have weakened the authority of Lord Hale. Even the authorities cited by Lord Hale from the year book of Edw. 3. and Fitzherbert's abridgement—Corone 150 & 282. do not warrant the doctrine in its full extent. Hawkins ſays only that it is HOLDEN in many books of good authority, (CONTRARY TO WHAT IS ADMITTED TO HAVE BEEN THE ANTIENT LAW) that the acquittal of a man as principal, is a good bar of a ſubſequent proſecution againſt him as acceſſary BEFORE; for it is ſaid that ſuch an acceſſary is in ſome meaſure guilty of the fact, and therefore that an acquittal, which clears a man from being guilty of the fact, doth by conſequence clear him from being ſuch an acceſſary. And this ſeems reaſonable UPON THE SUPPOSITION that a man may be found guilty of an indictment againſt him as principal, upon evidence which only proves him to have been an acceſſary BEFORE. But if a man cannot be found guilty of ſuch an indictment upon ſuch evidence, as it is ſtrongly holden that he cannot, it may WITH GREAT REASON be ſaid, that the acquittal of him as principal, no way acquits him as acceſſary BEFORE; for if ſo, he might ſave himſelf by a mere ſlip in the indictment, and bar all other proſecutions by an acquittal on a trial, which in truth never brought him into danger of his life. And it is upon this ſuppoſition, as I ſuppoſe, that it is holden in ſome books, contrary to thoſe above cited, that one who has been acquitted as principal, may be tried again as acceſſary BEFORE, as well as AFTER 2 Hawk. chap. 35. ſect. 11.——— Now it is well known, that, in detailing the different opinions upon any ſubject, Serjeant Hawkins always gave his own in the laſt place; and he appears evidently oppoſed to the principle ſet up by Lord Hale and others. The many books of good authority which he refers to, are Kelyng. 25-6. 1 Hale, 626. 2 Hale, 244. Crompton's Juſtice, 42. 112. 2 Edw. 3. 20. Fitzh. Corone, 150. In ſupport of his own opinion, he refers to Keilway, 107. Daliſon, 14. It is certainly true that the priſoner could not have been convicted as a principal upon evidence which proved him only an acceſſary BEFORE the fact. If we are right in this, then how abſurd it would be to ſay that an acquittal upon one indictment ſhall be a bar to another indictment, where the evidence on each of them muſt be ſpecifically different; where the ſame facts cannot apply to both; and what would be ſufficient to convict upon the one, could not apply, or ſerve to convict upon the other.

If the evidence in both cases was the same, then there might be some reason for the law; but as it is, altho' in point of crime and punishment, the offences are equal; yet as the circumstances are different, tho' tending to the same mischief, the law gives to them a different consideration. But if they are to be considered as the SAME offence, and an acquittal of a man as principal, will bar an indictment against him as accessary BEFORE; how still more absurd it is that the principle should not hold throughout. Yet we find it AGREED, 2 Hawk. 16. sect. 12. that an acquittal of a man as accessary BEFORE, is no bar to a subsequent prosecution against him as PRINCIPAL. Is it possible to reconcile the inconsistency?—It appears, however, by no means to be a settled point; nor has the practice been uniform; for in 2 State trials, 798. Samuel Atkins was tried on two several indictments; first, as principal, and next as accessary in the murder of Sir Edmondbury Godfrey. Sir Michael Foster, whose opinions upon the subject of the Crown law, are entitled to great weight, considers this point in pa. 361. 362. and is very far from adding strength and authority to the rule. Speaking of the connection between principals and accessaries, he says, "yet in considera-"tion of law their offences are quite different; and for that reason, I presume, "it is, that if A. be indicted as principal, and B. as accessary, and both are "acquitted, yet B. may be indicted as principal in the same offence, and his "former acquittal is no bar. 1 Hale, 625. On the other hand, it SEEM-"ETH to be agreed (1 Hale, 626. 2 Hale, 244.) UPON WHAT GROUNDS I "KNOW NOT, that if A. be indicted as principal and acquitted, he cannot "be afterwards indicted as accessary BEFORE the fact. "For," say some, "IT IS IN SUBSTANCE THE SAME OFFENCE." Others, (Kel. 25. 26) "If a man inciteth to the offence, HE IS QUODAMMODO GUILTY OF THE "FACT."

"In *foro cæli* this is true. In the sight of God, Ahab was the actual mur-"derer of Naboth. "Hast THOU," saith God to him by the prophet, "KILL-"ED and also taken possession?"—In the place where dogs licked the blood "of Naboth, shall dogs lick thy blood, even thine." 1 Kings, xxi. 19. And in the case of Uriah, God, by another prophet, saith to David, "THOU "hast killed Uriah the Hittite with the sword,—and slain him with the sword "of the children of Ammon." 2 Sam. xii. 9.

"But is it alſo true in *foro ſæculi*? By no means. For in the eye of "the law the offences of principal and acceſſary SPECIFICALLY differ, and "fall under a quite different conſideration. The point in the caſe reported by "Kelyng, 25—26. which was of an acceſſary after the fact, was at length "ſettled upon ſound principles of law and reaſon. But the reaſoning "upon that caſe founded on a diſtinction between what preceded or was "ſubſequent to the fact is, I confeſs too refined for my comprehenſion; and "probably will continue ſo, till I can remove antient land-marks, and for-"get the legal diſtinction between principals and acceſſaries, and every prin-"ciple of law founded on it. For if the offences of the principle and "acceſſary do, in conſideration of law, SPECIFICALLY differ; and if a "perſon indicted as principal cannot be convicted upon evidence tending "BARELY to prove him to have been an acceſſary before the fact, which I "think muſt be admitted, I do not ſee how an acquittal upon one indictment "could be a bar to a ſecond for an offence ſpecifically different from it. In "the caſe I firſt ſtated it was no bar, why therefore in the ſecond?—

"This I offer as a doubt of my own, which is ſubmitted to the opinion "of the learned."———

So far Judge Foſter. We will admit, that, if after this, Judge Blackſtone had conſidered the law as ſettled upon reaſon and authority, it would have thrown an almoſt inſuperable difficulty in the way. But he does not, as one of the priſoner's Counſel has ſaid, ſpeak of it as a SETTLED point. But referring to Hawkins and Foſter, and not attempting to remove their difficulties, he ſays, "it is a matter OF SOME DOUBT, whether, if a man be acquitted as principal, he can be afterwards indicted as acceſſary BEFORE the fact; ſince thoſe offences are frequently very near allied, and therefore an acquittal of the guilt of one, may be an acquittal of the guilt of the other alſo." No man, therefore, reflecting upon the reaſon of the law as laid down by Hale and in Kel. and conſidering the weighty objections againſt it, can undertake to ſay that is by any means a ſettled point. We on the part of the Commonwealth, think there is ſo little reaſon in it, that we can hardly doubt, but that, whenever this caſe, which is ſtill open for a final deciſion, ſhall come before the Court, they will not heſitate to decide that an acquittal of a man as principal is not any bar to an indictment againſt him as acceſſary BEFORE the fact. If we

are right on this firſt ground made for the priſoner, and even an ACQUITTAL of him on the former indictment, could not be pleaded to the preſent one, it makes an entire end of the queſtion; and whether the diſcharge of the former jury was legal or illegal; whether it was done regularly or irregularly, it can make no difference. But as long as the DOUBT DID REMAIN, and it turned out upon the evidence that he could not be convicted as principal, but only as acceſſary before, more eſpecially as this was induced by his own confeſſion and conduct, and in fact became a matter of neceſſity and propriety, it would not have been right for the Court to have given him the chance of pleading *auterfoits acquit*; the public juſtice required that ſo notorious an offender ſhould not eſcape. We contend that it was fair and juſt. The propriety of the meaſure, however, brings us to the laſt ground of argument.

As to this great point, the priſoner's counſel rely on the authority of 1 Inſt. 227.*b* 3 Inſt. 110. Carth. 465. 2 Stra. 984. 4 State trials 232. Lord Delamere's caſe; and 664 Rookwood's caſe; 2 Hawkins chap. 47. ſect. 1 and ſome other caſes which we will endeavour to anſwer. The opinion in Hawkins as well as in the other caſes is grounded upon Lord Coke's doctrine in 1 Inſt. 227.*b*: but if this can be ſhown to be itſelf without a foundation, at leaſt not an inflexible rule, then the fabric they have been raiſing upon it, muſt fall with it, whatever darkneſs may have reſted upon this ſubject before, yet ſince the great conſideration it received in the caſe of the two Kinlochs, there can remain no doubt now as to the power of the court to diſcharge a jury in certain caſes, wherever a neceſſity for it may exiſt. If the power is once admitted then the court, and the court only, can be the judges when it may be proper to exerciſe it. But Kinloch's caſe is ſaid to be by the conſent of the priſoner. We apprehend this makes no difference. For if the law of the land is, that the court have not the power to diſcharge a jury once ſworn in a criminal caſe, then no conſent could give it to them. If they can do it by conſent, they can do it without.

With reſpect to the caſe of the King & Jeffs, 2 Stra. 984. the Court were certainly right in refuſing to diſcharge the jury, becauſe the proſecutor was not ready with ſome of his proof, without which he could not proceed. Had they diſcharged the jury, it would have been exactly the caſe of Whitebread and Fenwick, 2 State trials, 715. 831. 832. which has been ſo much condemn-

el. We do not contend for the principle of that case. Besides all the cases cited for the prisoner, are cases where the second jury must have come to try the SAME indictment. Even this, it is admitted, may be done in certain extreme cases. But they do not apply here; because this is the case of a new indictment, we say for a different kind of offence, requiring different evidence; and where the evidence which would have been adapted to the former indictment, would not convict him on the present one. Have the gentlemen shown any case where this may not be done? they tell us Foster puts the very instance, and they would infer that he disapproved of it. His language is, in his celebrated argument in the case of the Kinloch's "The question is not, whether a jury may be discharged after evidence given, in order to the preferring of a new indictment better suited to the nature of the case: where through the ignorance or collusion of the officer, or the mistake of the prosecutor, the fact laid varieth from the real fact, or cometh short of it in point of guilt. This was frequently done, he adds, before the revolution, and in one or two instances since." Fost. 50. Now it appears to us from his mode of putting the case, that he was certainly of opinion that the jury might in such case, be discharged; and he even cites Kelyng 26, where the very thing now done was done in that case. The gentlemen have told us that case in Kelyng was long since exploded; but they have not shown us how or where; unless they refer to the followers of Lord Coke. It may be well to remark that Lord Holt was the publisher of Kelyng's reports, and if he had had any difficulty about the power of the court in this respect, he certainly would have suggested the doubt, as he has done in two instances in pa. 13 and 41, for the consideration of the learned. And in pa. 47 and 52 of the same book, it seems to be well agreed that the court may discharge the jury, and take no verdict, and then indict the prisoner over again, and these cases are all after evidence given. And in the case of the King versus Segar and Potter, on an indictment for burglary, the jury was discharged, after evidence given, without any question as to the right and this was in the 8th. Wm. 3. Comb. 401. The Counsel for the commonwealth have ventured to refer the court to 2 Hale, 295. 296. 297. More we suppose, for the sake of the note by the editor of that work, than for the text, which is directly against their proposition, and where the law is carried much farther than we contend for in this case. The jury was not discharged in this case for want of witnesses, or because they were kept out of the way; but solely for the purpose of preferring a new

indictment, ſuited to the truth of the fact; for the ſake of public juſtice, and not for oppreſſion, or to try the priſoner a ſecond time on the ſame indictment, when we might expect better and fuller evidence. It was for the purpoſe of trying him for an offence of which he was guilty, and not one of which he was not guilty. If the caſes put by Hale are law, then the authority is very ſtrong for us; for he lays it down, notwithſtanding the authority of my Lord Coke, "that nothing is more ordinary than after the jury ſworn, and charged with a priſoner, and evidence given, yet if it appears to the Court, that ſome of the evidence is kept back, or taken off, OR THAT THERE MAY BE A FULLER DISCOVERY, and the offence notorious, as murder or burglary, and that the evidence, THO' NOT SUFFICIENT to convict the priſoner, yet gives the Court a great and ſtrong ſuſpicion of his guilt, the Court may diſcharge the jury of the priſoner, and remit him to the gaol FOR FARTHER evidence, and accordingly it hath been practiſed in moſt circuits of England, for otherwiſe many notorious murders and burglaries may paſs unpuniſhed by the acquittal of a perſon probably guilty, where the full evidence is not SEARCHED OUT OR GIVEN." It it not neceſſary for us either to approve or diſapprove of the caſes put by Lord Hale. None of them are like the caſe before the Court, though much ſtronger; but as to the Editor's note, it is certainly not compoſed with critical accuracy; more eſpecially when he refers to Lord Delamere's caſe as the ground of his opinion; which we ſhall ſhow, by and by, is not at all applicable to the queſtion he was conſidering. Let it however be ſaid, that Lord Hale was one of the moſt cautious and humane Judges whoſe hiſtory we know any thing of; and was very far from ſtretching either law or prerogative for the ſake of oppreſſing the ſubject. And Judge Foſter, in the argument before cited, referring to 1 Vent. 69. where a jury was diſcharged, after they were ſworn, and the trial put off, becauſe the witneſſes were ſuſpected to be tampered with by the priſoner, ſays, "this is not the preſent queſtion, and I give no opinion on it; only let it be remembered, that Lord Chief Juſtice Hale juſtifieth this practice, which, he ſaith, prevailed in his time, and had long prevailed, by ſtrong arguments drawn from the ends of government, and the demands of public juſtice."—But what appears moſt ſtrange to us, is, that the priſoner's counſel ſhould have mentioned Lord Delamere's caſe as an authority for them, when they muſt have known that the caſes are by no means parallel; more eſpecially as they could not have been ignorant of the anſwer already given to it by all

the Judges in Kinloch's case. 4 State trial, 230. 232. after a lengthy examination of evidence on the part of the Crown, the prisoner, Lord Delamere himself was desirous of an adjournment. "May it please your grace, said he, a great part of the day is spent, and I would beg the favor of your grace, that I may have favor till to-morrow morning to review the notes I have taken, and then I shall make my defence." The Lord High Steward doubted of his power to adjourn, calling to mind, perhaps, the old tradition of the law; a considerable conversation then ensued; the Lord High Steward was willing to adjourn, if he could by law. Lord Delamere. "My Lord, I shall hardly be able to finish all I have to say in any convenient time this day." Lord High Steward. "But, my Lord, if an adjournment can not be by law, I cannot help it." At length the point was referred to the Judges; and they did give their opinions as has been stated on the other side. But what was the question? Not whether the court had the power to discharge the jury altogether, or not, which is the present question; but whether a jury once sworn in a capital case could be adjourned without giving a verdict. The case of an adjournment was what they had then in contemplation, and not the case of a total dismission of the jury. "In the common courts, said the judges, where the trial is by a jury, there the law is clear, the jury once charged can never be discharged till they have given their verdict, this is clear; and the reason of that is, for fear of TAMPERING with the jury." Now if the jury were totally dismissed, the danger could not happen, for they would never be called again upon the trial of the prisoner. The Judges refused to determine as to the power of the Lords; they only said, that the reason why a common jury could not be adjourned, failed in that case; for there was not the least presumption that the Lords, who were persons of great integrity and honor, could be prevailed upon in that way. But the Lord High Steward refused to adjourn. Now there is not one circumstance in the case of Lord Delamere analogous to the question before this court. 4. Black. 360. goes no further. It says the jury cannot be discharged (unless in cases of evident necessity) till they have given in their verdict. But the JUDGES may ADJOURN, while they are drawn to confer, and return to receive the verdict in open court. Judge Blackstone is here evidently speaking of the manner of proceeding in the trial, and not as to the power to discharge altogether; and although he refers to 1. Inst. 227. & 3 Inst. 110. we are to show that they are not of conclusive weight, however

right as laying down a good general rule. But even if the caſe of the Lord Delamere was applicable to the preſent caſe, we are able to ſhow that it is broken in upon, and is no longer the law; but the Judges have aſſumed the power to adjourn even in a capital caſe. And upon the authority we ſhall cite, this court, upon the former trial, did adjourn, and had four conſtables ſworn to keep the jury together. In 6. Term Rep. 530. The King againſt William Stone. The Court adjourned the jury. Lord Kenyon obſerved, "that neceſſity juſtified what it compelled. And that though it was left to modern times to bring forward caſes of ſuch extraordinary length, yet no rule could compel the court to continue longer ſitting than their natural powers would enable them to do the buſineſs of it"—accommodations were therefore prepared for the jury, and ſix bailiffs were ſworn "well and truly to keep the jury, and neither to ſpeak to them themſelves, nor ſuffer any other perſon to ſpeak to them touching any matter relative to this trial."—

Ambroſe Rookwood's caſe proves nothing for the priſoner. The jury were not indeed diſcharged in that caſe. But if the exceptions had been allowed, the indictment muſt have been quaſhed; and the jury then ſworn and charged muſt have been diſcharged without giving a verdict; yet, ſays Judge Foſter this could not have operated ſo as to diſcharge the priſoner from anſwering to another indictment for the ſame offence. Foſt. 36. Whatever weight, therefore, there is in this caſe, it is againſt the priſoner. A diſcharge upon a defective indictment, no more than an acquittal, could not avail him. 21. Vin. 343. 478. and 2 Hawk. ch. 47. ſect. 1. are both grounded on my Lord Coke, 1. Inſt. 227. b and can be of no greater authority than my Lord Coke himſelf: it is only citing the ſame caſe three or four times over, without affording additional authority. The opinion of Sir Martin Wright has alſo been mentioned, in the caſe of the Kinlochs, out of 1 Wilſ. 157. It is true, Sir Martin Wright was a very learned Judge. But of what conſequence is the opinion of a ſingle Judge againſt the ſolemn judgment of his nine aſſociates, equally learned as himſelf? The King againſt Perkins, mentioned in Carthew, 465. is brought forward to govern this caſe. In the caſe of the Kinlochs the Judges paid no attention or regard whatever to that authority; and ſaid it was doubtful whether there ever was ſuch a reſolution or no. That at all events it was an extrajudicial opinion. Carthew, therefore, is quite out of the queſtion; it had no weight with very learned Judges

in England, in conſidering this very queſtion; it can have no weight here; its authority is impeached and deſtroyed. Deciſions quite to the contrary have taken place ſince. See Foſt. 27. 28. 36. 37. we conſider Lord Coke, 1 Inſt. 227. *b* 3 Inſt. 110. as the great cornerſtone upon which the gentlemen hope to reſt the ſyſtem which they have ſo induſtriouſly been building up. My Lord Coke's authority, therefore remains to be inquired into. With the aſſiſtance of Foſter, we hope to ſatisfy the court, that it places no obſtacle in the way. The Judges in Kinlochs caſe, Foſt. 27. agreed "that admitting the rule laid down by Lord Coke to be a good general rule, yet it cannot be univerſally binding: nor is it eaſy to lay down any rule that will be ſo." Again, by Foſter himſelf, pa. 29. 30. "I take it to be one of thoſe queſtions, which are not capable of being determined by any general rule that hath hitherto been laid down, or poſſibly ever may be. For I think it is impoſſible to fix upon any ſingle rule which can be made to govern the infinite variety of caſes which may come under this general queſtion, without manifeſt abſurdity; and in ſome inſtances, without the higheſt injuſtice."—Again, pa. 31. 32. "It ſeems that an opinion did once prevail, that a jury, once ſworn and charged in any criminal caſe whatſoever, could not be diſcharged without giving a verdict; but this opinion is exploded in Ferrar's caſe, and it is there called a COMMON TRADITION, which had been held by many learned in the law."

"My Lord Coke was one of thoſe learned men who gave into this TRADITION, as far, at leaſt, as concerneth capital caſes; and he layeth down the rule in very general terms, in the paſſages which have been cited on behalf of the priſoners from his firſt and third Inſtitutes."

"The ſame rule is laid down in Hale's Summary of the pleas of the crown; a very faulty incorrect piece; never reviſed by him, nor intended for the preſs."

"But as his Lordſhip, in his hiſtory of the pleas of the crown juſtifieth the contrary practice, his authority is clearly on the other ſide of the queſtion: and his authority is the more to be regarded, becauſe he had ſeen and well conſidered the paſſages cited from Lord Coke; though I believe the

rule, as it ſtandeth in his Summary, hath contributed not a little to the confirming many people in Coke's opinion."

"My Lord Coke layeth down the rule in very general terms; but he hath not given us any of the principles of law or reaſon whereon he groundeth it. He hath, indeed, in his firſt Inſtitute, cited one, and but one authority in ſupport of it, and that authority doth not, to my apprehenſion, in the leaſt warrant it."

The authority which Coke cites is 21 Edw. 3. 18. Foſter goes on to conſider that caſe; which was the caſe of a man indicted for larceny, who had pleaded NOT GUILTY, and when the jury were at the bar prayed to become an APPROVER; which was refuſed conſiſtently with the rule laid down by Stanford Pl. Cor. 144.*b* Bro. Corone, 42. and which prevailed for a long time, that a perſon who had once pleaded to iſſue, could not after that be admitted to a confeſſion in order to ſave his own life, by charging other perſons ſuppoſed to be his accomplices in the ſame fact. But this rule was afterwards relaxed, vide 2 Hale, 228. of courſe the only authority which Lord Coke relied upon for the ſupport of his rule, is itſelf deſtroyed. With regard to this point, ſays Foſter, pa. 34. "the admitting, or not admitting perſons to become approvers, was always conſidered as a matter of MERE DISCRETION in the Court; as a matter of grace, and not of right: and yet we ſee, that in a matter of mere diſcretion, the Court did frequently, upon the ſpecial circumſtances of the caſe, diſcharge juries, after they were ſworn and charged, and had in part heard the evidence."

"Theſe inſtances muſt therefore be conſidered as ſo many exceptions to the general rule; tho', I confeſs they do not come up to the caſe of diſcharging one jury, and bringing the priſoner to his trial by another.

"But ſtill they ſhow, that the rule now contended for on the part of the priſoners, cannot be true in the latitude the words import: and I think they do in part ſhow, what I hinted in the beginning, that no general rule can govern the diſcretion of the Court on this queſtion in all poſſible caſes and circumſtances."—

In Manſell's caſe, 26. Eliz. 1. and 103. 104. The jury was diſcharged by the priſoner's conſent; and he was tried again by a ſecond jury and hanged; and it was agreed by all the Judges, that it might, and had often been done. In the caſe of one Ferrars, againſt whom an information was exhibited for forgery, it was reſolved by all the Juſtices, that although the jury be charged and ſworn in the caſe of a plea of the Crown, yet a juror may be drawn or the jury diſmiſſed, contrary to COMMON TRADITION, which hath been held by many learned in the law. Tho. Raym. 84. and in 1 Vent. 28. it is noted to have been ſaid by Serjeant Maynard, that after all the evidence given in an information, the King's counſel may, without the party's conſent, withdraw a juror, and try it over again; and ſo he ſaid it was done by Hobart, Attorney-General, 5 Hen. 7. and in the Exchequer by Noy, in King Charles the firſt's time. What then becomes of the inviolability of Lord Coke's rule? We not only find caſes frequently in oppoſition to it, but Judges of the firſt reputation diſſenting from it in the latitude it is laid down. But, ſay the Counſel for the priſoner, the exceptions to the rule are either caſes of extreme neceſſity, as the inſtance put by Foſter, pa. 34. of the man in a phrenzy pleading to an indictment, and it appearing to the Court, on the trial, that he is mad, the Judge, in diſcretion, may diſcharge the jury of him, and remit him to gaol, to be tried after the recovery of his underſtanding. 1 Hale, 35. And the caſe of King and Gould, where one of the jurors died; or where it may be done of humanity, as in the caſe of Elizabeth Meadows, Foſt. 76. who was taken in labour pending the trial; or out of regard to the life of the priſoner, as in the caſe of the Kinlochs, to let them into a defence they could not otherwiſe have had. It is true, all theſe are caſes depending upon particular circumſtances; but then an infinite variety of other caſes might happen, which would equally require the interpoſition of the Court. For if once the power of the Court is admitted, as the gentlemen certainly have admitted it in theſe caſes; then all their arguments apply only to the IMPROPER EXERCISE of that power. The Court muſt judge of that; and, in this inſtance, they have thought this a proper caſe to call forth their extraordinary powers. But precedents are not wanting to the very point; for in the caſe of Ann Hawkins, cited from the manuſcript of Mr. Juſtice Tracy, in Foſt. 38. We cannot diſtinguiſh the circumſtances attending it from thoſe in the preſent caſe. In that caſe it was found, UPON THE EVIDENCE ON THE TRIAL, that the fact was not truly

ſaid; thereupon the jury was DISCHARGED OF THAT INDICTMENT, AND IT WAS AMENDED; and the priſoner tried upon the AMENDED indictment. We would be glad to know what anſwer is to be given to this caſe. The caſe of Elizabeth Meadows has already been obſerved upon; it moſt certainly eſtabliſhes the power of the Court to diſcharge in oppoſition to Lord Coke. And again, in Foſt. 327. 8. where the learned Judge is arguing upon the difference between MURDER & PETIT TREASON, he proceeds thus: "But if through a miſtake on the part of the proſecutor, or through the ignorance or inattention of the officer, a bill be preferred as for murder, and it ſhould COME OUT IN EVIDENCE, that the priſoner ſtood in that ſort of relation to the deceaſed which rendereth the offence PETIT TREASON, I do not think it by any means adviſeable to direct the jury to give a verdict of acquittal. For a perſon charged with a crime of ſo heinous a nature, ought not to have the chance given him by the Court of availing himſelf of a plea of *auterfoits acquit*. In ſuch caſe I SHOULD MAKE NO SORT OF DIFFICULTY OF DISCHARGING the jury of that indictment, and ordering a freſh indictment for petit treaſon. In this method the priſoner will have advantage of his peremptory challenges, and the public juſtice will not ſuffer. This then is deciſive language. But what is the anſwer given to it? It is called a chamber opinion, and ſpeculative reaſoning.—But when a Judge of Foſter's reputation, with his knowledge and experience, who had previous to this deliberately conſidered the ſubject; who had heard it exhauſted, and every caſe relative to it brought before him for his judgment and deciſion in the caſe of the Kinlochs, by very learned counſel; who had weighed the rule laid down by Lord Coke, and reflected on all its conſequences; when ſuch a Judge with the whole light and learning of a century before him, declares that he would not HESITATE to diſcharge a jury under circumſtances like the preſent; it is ſomething more than chamber opinion or ſpeculative reaſoning. He muſt have been ſatisfied it was the law of the land, well ſettled and long eſtabliſhed. A Judge of Foſter's extreme caution and great learning would not have ventured the expreſſions, if there had been any doubt of the law. But what have we ſaid, or what can we ſay, that has not been already much more ably ſaid in the books upon the ſame point. We cannot ſee any force in the objections which are made, and we confidently leave them with the court. But it is further objected that the reaſons of the diſcharge of the jury are not entered upon the record. We are very indifferent as to that—If it has ſo

happened we apprehend it cannot alter the caſe. If indeed we were bringing the priſoners to a ſecond trial upon the SAME indictment, it might be neceſſary that it ſhould appear on the record why the former jury was diſcharged; if the record ſhould be defective, it might be taken advantage of in arreſt of judgment. But this is not the SAME record; it is a new indictment; nothing of what paſſed before appears upon this record, nor can they move in arreſt of judgment for that cauſe upon the record in this caſe. If they chooſe to enter the plea of *auterfoits acquit*, let them try it; they muſt then produce the record. We believe it cannot avail them. If we thought it at all material, we apprehend it is not too late to amend the entry, upon the authority of Douglas, 362. [377] where Lord Mansfield ſaid it was impoſſible to believe there was ſuch an abſurdity in the law, as that a mere miſtake of the officer ſhould be without a remedy. And he mentioned a caſe of one Gibſon who had been tried for robbing Mr. Francis, and convicted, and a miſtake being diſcovered in the verdict, upon conſultation with all the Judges at his chambers, it was corrected from minutes ſigned by the jury, and the priſoner executed. So here, if, by any inattention, the entry is defective, the court, who have taken full and correct notes of every thing that took place, might amend the entry by their notes; but as we conceive it altogether immaterial, we do not move it at preſent.

Upon every ground, therefore, we pray that the priſoner may be ordered to plead, and that we may proceed upon his trial.

FISHER, CLYMER & DUNCAN, in Reply.

We apprehend the ground we have taken, that where one is acquitted as principal, he cannot be again tried as acceſſary BEFORE the fact, is ſettled and incontrovertible. It was one of the reaſons mentioned at the laſt Court, why the jury ought to be diſcharged. We think it then fell from the Court. The preſent inquiry is, whether the diſcharge of the jury from the priſoner, at the laſt Court, amounts to an acquittal. The Court will never regret the patient hearing they have given to our objections. Whatever may be the reſult; whether they ſhall diſcharge him, or order him to plead, they muſt be better ſatisfied that it has undergone a deliberate conſideration, than that the difficulty ſhould occur, or be ſuggeſted when it might be too late. As things have happened, we are induced to believe that a hair of the priſoner's head can never be touched upon the preſent indictment.

We have heard much ſaid about the diſcretion of the Court. The diſcretion of the Court, in a caſe like the preſent, where the life of a man is at ſtake, is a ſtrange idea to us! If there is any caſe where the law ſhould be fixed and inflexible, it is in a capital caſe. The life of a citizen is never to depend upon arbitrary will, or private affection; and though diſcretion is nothing but exerciſing the beſt of one's judgment upon the occaſion that calls for it, yet if it be wilfully abuſed, it is CRIMINAL. When a plea to a court of juſtice, it means SOUND diſcretion, GUIDED by law. It muſt be governed by RULE, not by HUMOUR. It muſt not be ARBITRARY, VAGUE and FANCIFUL, but LEGAL and REGULAR. Arbitrary diſcretion, ſaid C. J. Pratt, afterwards the illuſtrious CAMDEN, is contrary to the GENIUS of the COMMON LAW OF ENGLAND, and would be more fit for an eaſtern monarchy than this land of liberty. Co. Lit. 227.a.—1 Burr. 560. 570.—4. Burr. 2539.—2. Wilſ. 138.

Does the diſcharge then amount to an acquittal?—We think we have ſhown that this indictment is for the ſame offence, and that the priſoner ought not to be twice put in JEOPARDY for it: and that a jury having been once ſworn in his caſe, and diſcharged, he never can be put upon his trial again; and that therefore ſuch diſcharge has the ſame operation as an acquittal upon record.

There are two exceptions to the caſe in Ventris. 1ſt. It is not a capital caſe. 2dly. It is a caſe in the time of Charles the 2d. And tho' ſuch a practice might have crept into the Courts in that arbitrary reign, the good ſenſe of after times has entirely exploded it.

But it is ſaid that this was a caſe of neceſſity. We take the caſe of neceſſity to be ſuch an one as the wit of man cannot foreſee; of courſe it can only be remedied when it really occurs. But a confeſſion to a Judge, after the trial has commenced, is not of that extreme kind. If that would warrant a diſcharge of the jury, the caſe muſt frequently have occurred in England; and yet we find no caſe in the books where a jury was ever diſcharged upon that ground. This, therefore, is a new caſe. Will the Court be *aſtute* in adding to the caſes of extreme neceſſity, for the ſake of getting at the priſoner? We know of but two ſuch caſes, which have been cited at the bar. For

the honor of Pennſylvania, perhaps it is reſerved to diſcover a THIRD, like the preſent. If the Courts give an opening, by deviating from the rigid rules of law; bad Judges, at a future day, may apply this deciſion to cut down honeſt and innocent men. Suppoſe Mr. Attorney would now refuſe to proceed againſt the priſoner upon this bill, as acceſſary, but indict him back again as principal; what would this lead to—what would be the conſequence? —The Court will obſerve the caution uſed in Kinloch's caſe; every minute particular is entered upon the record, that the ground upon which the Court went might forever appear; and that it ſhould not operate as an authority upon the general queſtion. That is then an authority ſtanding alone. In the preſent caſe no conſent is entered, nor any other reaſon; why the jury were diſcharged in this caſe no where appears; the record, in this reſpect, is defective. In Kinloch's caſe it was expreſſly entered, THAT NO EVIDENCE WAS GIVEN. But it is ſaid that this may be ſupplied, and the reaſons for the diſcharge now entered from the notes or minutes taken by the Court. We apprehend not. In Co. Lit. 260. a it is laid down, that during the term when any judicial act is done, the record remaineth in the breaſt of the Judges of the Court, and in their remembrance, and therefore the roll is alterable during that term, as the Judges ſhall direct, but when that term is paſt, then the record is in the roll, and admitteth no alteration, averment, or proof to the contrary. We ſay that this Court, more eſpecially as it is a criminal Court, have not the power to add to, or alter the record of the former Court of Oyer and Terminer.

But it is ſaid the firſt indictment is defective, and we are called upon to ſupport the goodneſs of that indictment. The counſel for the Commonwealth are now willing to acknowledge a miſtake of their own, for the ſake of puniſhing the priſoner. The queſtion is of ſome importance to the priſoner; for if the indictment is ſo bad that no judgment could have been rendered on it, he muſt anſwer again. We undertake, however, to ſhow that it is a good indictment. It is ſaid to be defective, becauſe it does not ſtate, that FRANCIS SHITZ DIED OF THE MORTAL WOUND. If this indictment is conſtrued by the rules of common ſenſe, grammar or law, then it is clearly ſupportable. The indictment, to be underſtood, muſt be read together; the whole count muſt be conſidered in one connected point of view; it is unqueſtionably one ſentence, and cannot be divided. It is ſufficiently certain that the deceaſed

DIED OF THE MORTAL WOUND; these expreſſions are connected with the whole ſentence, and runs through the whole of it; to repeat it would be tautology. No Judge can heſitate upon the point; on reading the indictment it is impoſſible for any one to ſay that it is not evident upon the face of it that FRANCIS SHITZ died of the mortal wound received from the priſoner. It is not like the caſe of poiſon; that caſe ſtands alone. It would be neceſſary there to ſtate that the deceaſed died by the poiſoning; becauſe death is not abſolutely the certain and natural conſequence of poiſoning; a man may be badly poiſoned, and yet not die; there are powerful antidotes to poiſon, which will effectually counteract it. But when it is ſtated here that the deceaſed received a MORTAL wound, and that he afterwards died, can any one ſuppoſe, for a moment, that it was not of the MORTAL WOUND he died? For unleſs death followed, the wound could not be MORTAL. The indictment would have been good without ſtating that the deceaſed LANGUISHED. The LANGUISHING may be ſtruck out as SUPERFLUOUS: it will then read thus: "OF WHICH SAID MORTAL WOUND THE SAID FRANCIS SHITZ ON THE 29th DAY OF DECEMBER IN THE YEAR AFORESAID, AT THE PLACE AFORESAID, AND WITHIN THE JURISDICTION OF THIS COURT DID DIE." But read it as it is: it is all one ſentence, and the mortal wound refers to and runs through the whole. In 2 Hawk. c. 25. ſect. 60. it is ſaid the law will not admit of too great nicety of this kind; for it hath been adjudged, that if in the firſt part of an indictment of death, the aſſault be laid with malice prepenſe, &c. there is no need to repeat it in the following clauſe, &c. But if the Court ſhould even doubt whether the indictment is good or not, that doubt ſhould operate in favor of the priſoner. In the Crown Circuit Companion, altho' moſt of the precedents are the other way, there is one precedent exactly like the preſent, and from which this was probably taken. It is the caſe of Captain Kidd.

HENRY, Preſident.

To contravene Hawkins, which is expreſſly in point, it will be neceſſary for you to produce ſome adjudged caſe different from it to raiſe a doubt. A mere precedent, particularly in the caſe of capt. Kidd, who was tried for a variety of offences, can have no ſuch operation; unleſs you ſhow further that a motion was made in arreſt of judgment upon it, and that it was held ſufficient, by the judgment of the Court. Kidd's counſel might not have

thought it worth while to have taken notice of such an objection, as he was convicted upon a variety of other indictments for capital crimes.

Mr. DUNCAN. I own there are considerable doubts.

HENRY, President. You had better confine yourself to this point. If you can remove the difficulty we will hear you.

The prisoner's counsel hearing the opinion of the court, did not proceed in their argument. They however filed a kind of a plea for the prisoner, protesting that he was not guilty, and setting out the first indictment, (*in hæc verb*) and stating the discharge of the jury, and concluding in this way, "wherefore the said John Hauer prays judgment if the court here will farther proceed upon the indictment aforesaid against him, and that he may be dismissed from the court here of and upon the premises, &c.

The Attorney General demurred thereupon, and the court instantly overruled the plea, and ordered that the prisoner should plead over to the indictment.

HENRY, President.

On this plea, which brings into question the legality of the indictment against the prisoner, filed at the last court of Oyer and Terminer, we have no hesitation to say that it is defective in one material point, to wit, the not having laid that Francis Shitz died of the wounds he received. Upon this point Hawkins is express and decided. The Court being clear in this, and the circumstance being conclusive, it is unnecessary to decide the general question; we leave that, therefore, where it is, without giving any opinion upon it. But if this were a case similar to the case of Whitebread and Fenwick, we should not hesitate to declare that to discharge a jury after they have been sworn, and to postpone a trial for the sake of getting better evidence on a second occasion, without any thing more in the case, is detestable, and ought never to be practiced.

Let the prisoner be put to plead to the indictment.——

CLERK of Oyer and Terminer.

How ſay you, John Hauer, are you guilty of the felony whereof you ſtand indicted, or not guilty?——

The priſoner ſaid nothing.

COURT. Aſk him again.

CLERK of Oyer and Terminer.

How ſay you, John Hauer, are you guilty of the felony whereof you ſtand indicted, or not guilty?——

The priſoner was ſilent.——

Mr. C. HALL, for the Commonwealth.

We pray the court, as the priſoner ſtands mute, and will not plead, to order the plea of NOT GUILTY to be entered for him, according to the directions of the act of Aſſembly, 3. State Laws, 119. ſect. 5.

The Court, conſidering that the priſoner ſtood mute from obſtinacy, ordered the plea of NOT GUILTY to be entered for him on the record; which the Clerk did accordingly, and the Attorney General thereupon joined iſſue.

HENRY, Preſident.

Mr. Attorney, how do you mean to try the priſoners?

Mr. HALL. We mean to try Hauer, Cox and Donagan together.

Mr. HOPKINS. We hope that they may not be tried together. It would be a very unfair proceeding. We are willing to try Cox and Donagan together, and will enter into any ſtipulation to join in the challenges. We think, as the caſe is circumſtanced, it ought not to be inſiſted on to try them together. We hope the Court will recommend it to the Counſel for the Commonwealth to try them ſeparately.

HENRY, Preſident.

We have nothing to do with it. The Attorney General may proceed as

he thinks proper. I know of no other way you have, but to ſever in your challenges, and exhauſt the pannel.

Let the trials of JOHN HAUER, PATRICK DONAGAN & FRANCIS COX come on to-morrow morning at 8 o'clock.

MEMORANDUM.

The foregoing arguments are blended together from the obſervations of all the counſel. It would have occaſioned much repetition, and have extended this trial to a very unreaſonable length, to have given the ſpeeches of all the counſel ſeparately.—The ſame plan will be followed in ſumming up the ſpeeches and obſervations upon the evidence.

FRIDAY, JUNE 15th, 1798. 8 o'clock, A. M.

The three priſoners were brought to the bar.

Meſſrs. HOPKINS & CLYMER mentioned to the Court, that their clients Donagan & Cox wiſhed to ſay ſomething to the Court.

The Preſident then aſked them, ſeparately, what they had to ſay to the Court.

They then ſtated to the Court, that they did not wiſh to be tried along with John Hauer who had confeſſed himſelf guilty; and hoped the Court would ſuffer them to be tried by themſelves.

MR. HOPKINS then renewed his motion, that the two priſoners ſhould be tried diſtinct from Hauer; and prayed the Court to recommend it to the Attorney General to conſent to it.

The Court ſaid, if the counſel would ſhow them that they had a power to interfere, and direct the Attorney General how he ſhould conduct the trial, then perhaps they would exerciſe a diſcretion; but until then they would not interpoſe, becauſe they believed no ſuch power veſted in the Court.

N. B. See upon this point Richard Noble's trial. 5 State trial, Hargrave's edition, pages 3. 7. 11. and the remarks thereon.

Mr. Thomas Elder thereupon read a memorial from Patrick Donagan & Francis Cox, ſtating that they were natural born ſubjects of his Britannic Majeſty, and as aliens, by the laws of Pennsylvania, were entitled to a trial by a jury *de medietate linguæ*, and therefore prayed, that as to them, the array &c. might be quaſhed. At the requeſt of their counſel, the priſoners were then ſworn, in open Court, as to the truth of the matter ſtated in their memorial.

The Court ordered the memorial to be filed.

Elder cited Dallas 73. The caſe of the four Italians.

Hopkins. When this matter was mentioned at the laſt Court, it created doubts in my mind; particularly when the caſe in Dallas is brought into view. In that caſe the priſoners were *Italians*; and between their country and this, there is no reciprocity as to a trial by jury. This caſe is therefore ſtronger; becauſe in England, of which country theſe men are ſubjects, an American would be entitled to the ſame mode of trial.

C. Smith, for the Commonwealth.

However this might be, if it ſtood ſingly upon the caſe in Dallas, we do not apprehend to be now neceſſary to enquire. Yet even in that caſe, the court appear to have decided with great reluctance, and ſeem to have wanted nothing but a plauſible reaſon to have rejected the motion. That caſe, however, is grounded upon a particular reaſon, viz. the extenſion of the Britiſh Statute of 28. Edw. 3. by the conſtitution of Pennſylvania; which Statute had been in force in the Province previouſly to the revolution. But ſuch Statutes are only to remain in force until ALTERED by the Legiſlature.—But ſince that deciſion in Dallas, the Legiſlature have altered the mode of ſummoning and impannelling a jury by the ballotting act, paſſed the 19th March 1785. 2. State Laws, 262. Since which, no jury can be ſummoned in any other way than is directed by, and under the authority of that act. The reaſon of the caſe of the Italians, therefore, entirely fails; and it

would be highly inconvenient if the law ſhould have continued agreeably to that deciſion, for very obvious reaſons. In England the Statute ſtill remains in force as to criminal caſes. But in civil caſes, to which only the Engliſh ballotting act extends, Judge Blackſtone makes the ſame queſtion, whether the court there have now a power to direct a pannel to be returned *de medietate linguæ*, and thereby alter the method preſcribed for ſtriking a ſpecial jury, or ballotting for common jurors. 3. Black. 360.

HOPKINS cited 2 Hale, 271.——As to the act of aſſembly we conceive it to be only directory to the Sheriff, and not binding on the Court. The Sheriff is merely a miniſterial officer, and is bound to obey the precepts and injunctions of the Court. But here we lay a ground for a *venire de medietate linguæ* before the Court, previous to the Sheriff having any thing to do with it; and if the Court directs ſuch *venire* to him, he is equally bound to execute it.——

The Court in addition to the act of aſſembly, mentioned the caſe in Dyer 304. *a* and 2 Hawk. ch. 43. ſect. 41. and ſaid they were of opinion that the priſoners were not entitled to this challenge and accordingly overruled it.

CLERK of Oyer and Terminer. Cryer make proclamation.

CRYER. Oyes, Oyes, Oyes, you good men of the county of Dauphin, ſummoned to appear here this day to try between the Commonwealth of Pennſylvania, and the priſoners at the bar, anſwer to your names as you ſhall be called, upon pain and peril ſhall fall thereon.

Then the jury who were returned on the pannel, were all called over, and the appearances of all thoſe that anſwered to the call, were recorded. 72 jurors appeared. Note: 80 jurors were ſummoned and returned, under the authority of the 4th. ſection of the ballotting act of 1785.

The court fined the defaulters £.3 each.

CLERK of Oyer and Terminer.

You, the priſoners at the bar, theſe good men, whom you ſhall hear called, and do now perſonally appear, are to paſs between the commonwealth and you, upon trial of your life and death. If therefore you will challenge them, or any of them, your time is to challenge them as they come to the book to be ſworn, and before they be ſworn.

The counſel for John Hauer declined making any challenges on his behalf.

CLERK. Call Jacob Greenawalt.

JUROR. Here.

CLERK. Juror, look upon the priſoners. Priſoners look upon the juror. Patrick Donaghan, do you challenge him? Challenged, by Patrick Donaghan. He was then ſet aſide as to all.

CLERK. Henry Berry.

JUROR. Here. Juror, look, &c. Patrick Donagan, do you challenge him? Not challenged.—CLERK. Francis Cox, do you challenge the Juror?——Challenged by Francis Cox. The juror was then likewiſe ſet aſide as to all the priſoners.

CLERK. Thomas M'Elheney.

JUROR. Here. CLERK. Juror, look, &c. Patrick Donagan, do you challenge him? Not challenged. CLERK. Francis Cox, do you challenge the Juror? Not challenged. CLERK. John Hauer, do you challenge the Juror? John Hauer refuſed to anſwer.

The Juror was then ſworn.

In the ſame manner they proceeded till a full jury was ſworn. Donagan and Cox challenging alternately, with an apparent view to have as few Germans as poſſible ſworn upon the Jury.

THE JURY SWORN WERE,

1. THOMAS M'ELHANY,
2. SAMUEL STURGEON,
3. JOHN BLATTENBERGER,
4. HENRY M'CORMICK,
5. SAMUEL COCHRAN,
6. WILLIAM CRANE,
7. JOHN WILSON, JUN.
8. JOHN NORTON,
9. JOHN PARTHIMER,
10. JAMES JOHNSON,
11. HENRY FULTON,
12. JOHN SNODGRASS.

NOTE. William Porter was called, but ſet aſide by the Court, he not being a citizen of the United States when ſummoned. Mr. Porter being a man of a fair reputation, the counſel on neither ſide made any objection to his being ſworn; but the Court thought it right and prudent, on account of the principle, to reject him.

The Clerk of OYER and TERMINER read the indictment, and charged the jury.

Mr. HALL opened the evidence much at large, with great force and perſpicuity.

JOHN DENTZEL, Eſq. was ſworn as Interpreter: a number of the witneſſes not being able to ſpeak Engliſh.

EVE DOEBLER, (ſworn.)

Francis Shitz went to Philadelphia about five weeks before Chriſtmas. While he was away, John Hauer came to the houſe, and aſked if Peter ſlept alone in the chamber. I ſaid, yes. He ſaid, one could frighten him curſedly. I told him that any perſon would not go out of the houſe as he

came in. Hauer ſaid, why? Has Peter got his rifle there yet? I told him I had ſeen none as long as I had been there. Then he went into the room and chamber, and ſearched about. He came out again, and ſaid he could not find any thing but a dram bottle. He then drank a dram out of it. There was a little boy, called George Deefinger preſent; and he aſked him to drink a dram. The boy aſked me if I would drink a dram too; I ſaid yes; but when I went to drink, the boy knocked the botttle, and the dram was ſpilled: I then told him to take the bottle into the room; which he did.

[The witneſs then went into a detail of the dreadful ſcene on the night of the murder; but as it is given at large on the trial of M'Manus, to avoid repetition in this, and in the caſe of all other witneſſes who were examined on that trial, ſuch teſtimony will only be referred to—except where they may have proved additional matter, as in the preſent inſtance.]

CROSS EXAMINED.

I never ſaw Francis Cox in the neighbourhood of Shæfer's town before the murder.

I ſaw Patrick Donagan only once at Shitz's; he came with a man, I did not know, to buy hogs.

SAMUEL REX, Sworn. (See his evidence on the trial of M'Manus.) When we were at Shitz's houſe, the night of the murder, we proceeded to ſearch whether or no the houſe had been robbed. We went into the back room and examined the cheſt. There was no appearance of any violence to the property; we all concluded there had been no deſign to plunder. Our ſuſpicions immediately fell upon Hauer. Eight or ten armed men then ſtarted to Hauer's, and we waited till they returned. When they came, Mrs. Hauer fell down at the bed ſide, and cried bitterly. Hauer ſat down on the bench and did not ſay a ſingle word. The maid inſiſted that Francis had been ſhot; we ſearched, but could not find the wound. Hauer then ſaid, you had better look, may be he was ſhot in the mouth. I told him I thought not; and he ſaid nothing more: he looked very much dejected. (Piſtol ſhown.) I believe this piſtol to be the ſame which was

found in the houſe; it appeared to have been newly fired; upon a perſon blowing in it there came forth a ſtrong ſmell of gunpowder. We afterwards diſcovered that the ball had followed the track of his right ear. He had FOUR gaſhes on his head, which appeared to be done with a ſharp inſtrument. He died about 10 o'clock the next morning.

CROSS EXAMINED.

I do not know that I ever ſaw Cox in that neighbourhood.

I have frequently ſeen Patrick Donagan before the murder. He had made his home at Hauer's about a twelvemonth. I have heard that he was induſtrious, and worked about as a jobber: I don't know that he ever did a day's work about Shæfer's town.

When we had been at Shitz's houſe a little while, I think it was 1 o'clock.

LEONARD DOEBLER, Sworn. (Exactly as before. See his evidence on M'Manus's trial.)

GEORGE BAKER, (Sworn.)

I was at Valentine's, in Shæfer's town, the day before the murder happened, cutting wood for him. Hauer ſtood at the market houſe, and called me to come to him. He told me I ſhould come out to his houſe to threſh oats for him. I ſaid I would come out. But Hauer ſaid, no, you won't come. He aſked me again if I WOULD come, and I ſaid, yes. He again ſaid, you won't come, "I had better leave the horſe for you here." He left the horſe for me, and I went out. It was half an hour after 7 o'clock when I came to his houſe. When I came there, I wanted to know where to put the horſe. I went up to the houſe, knocked at the door, but nobody anſwered. I then took the horſe to the ſtable. When I wanted to put the horſe up in the ſtable, Hauer called out to me not to put the horſe in that ſtable, but in the other. When I went into the houſe, Hauer was in bed near the window; Mrs. Hauer was ſitting on a chair aſleep. I aſked Hauer, where was Pat. Donagan. He ſaid he rode down to Ilig's that morning. I then aſked, where is Betſy, Charles M'Manus's wife? Hauer

ſaid, Charles fetched her away, but he did not know which way they went. I ſtripped myſelf and laid down on a bench. I ſlept on the bench till 9 o'clock: then Hauer roſe, and drew out a ſmall bed where the children uſed to ſleep, and told me I ſhould ſleep there. I ſlept there till two o'clock in the morning—I waked, and ſaw Hauer ſtanding before the ſtove, making a fire. I ſlept again about half an hour, when the people came, about ten of them; they were all round about me, and Swanger hallooed to me and I awoke. They all went up to Shitz's, and I went along.

I had often worked at Hauer's before, and ſlept there. Hauer always before made me ſleep in another room,—in the old room. The old room is on the left hand as you go into the houſe. The kitchen is between the old room and the room where Hauer ſlept, which is at the other end of the houſe.

CROSS EXAMINED.

The night was not very cold. I had ſlept before in Hauer's houſe, in Summer and Winter; but never ſlept before in the room where I ſlept that night. When I came there in the evening, Hauer got up and opened the door for me. I fell aſleep before Hauer told me where to ſleep. One child ſlept in the bed with me. There was no ſtove in the old room. It did not ſeem to me to be very cold. I do not know whether Hauer had any oats to threſh or not. He had two horſes in the ſtable, beſides the one I brought. There was a little moon-light that night. I am 18 years old. As far as I know Hauer was not OUT that night. Pat. Donagan uſed to ſleep in the old room. I helped one day laſt Harveſt, when Donagan was there. Charles M'Manus was there. I ſlept with Charles M'Manus in the old room; he was not married then. I never ſaw Cox in that neighborhood. There was a feather-bed in the old room; one might ſleep comfortably enough there in cold weather. When Hauer let me in, he looked as if he had been aſleep. When I ſaw him at the ſtove, he had ſtriped trouſers on, and nothing elſe.

NICHOLAS SWANGER, (Sworn.)

About three or four weeks before the murder, Hauer, came to my houſe. He told me he was bad off. I aſked, for what? He ſaid, his father-in-law, old Shitz, came every night to his houſe—that he came as a white ghoſt. I ſaid, I

could not believe that—if there was any ſuch thing, the ghoſt would have been in his own houſe, where he died. I told him I did not know what he could do there. He ſaid, I can tell you that. I aſked him what it is. He ſaid if the two boys WOULD AGREE TO MAKE ANOTHER WILL, SO THAT HE MIGHT HAVE A BETTER SHARE, old Shitz would ſettle himſelf, and come no more there. He told me I ſhould go down and tell them boys; I told him I would not go down—that I did not believe ſuch things: and I did not go. That is all I know about the ghoſt.

On the night of the murder, 8 or 9 men called on me; they told me what had happened, and wanted me to go along to Hauer's houſe. I went along with them. When we came to Hauer's houſe, we kept ſtill a little, to watch if we could ſee any one running; but we could ſee nothing. Deefinger called out "John Hauer!" and as ſoon as he was called, he opened the door, and had a candle in his hand ready lighted. As ſoon as he opened the door, he went back with the candle; we went in with him. He ſaid nothing at all, but ſet the candle on the table, and went behind the ſtove. We told him he ſhould get ready and come along with us, his brother-in-law was in a bad way. He and his wife, and a boy that was ſleeping there, one Baker, got ready and went along with us. Hauer ſaid nothing at all.—when we came to Francis Shitz's we went into the room to ſee him. Hauer looked over his ſhoulder, a little, at him; and immediately went behind the ſtove, and ſaid nothing,—I did not perceive how he looked at his own houſe—I could not ſee his face: he had his hat much flapped over his face. When he opened the door for us, at his own houſe, he made no enquiries of us—did not aſk us what we wanted, nor what brought us there that time of night.

Patrick Donagan had lived a year, or a year and an half at Hauer's houſe before the murder was committed. He had his home there the night of the murder, as far as I know. I can't tell how he got his living.

CROSS EXAMINED.

I can't tell whether Donagan was induſtrious or not, becauſe I never had any connection with him. I never heard of Cox being in that neighborhood before the murder was committed.

I think it was near THREE o'clock when we came to Hauer's houſe. We were not half an hour going from Hauer's to Shitz's. I think it was about 2 o'clock in the morning when the people came to my houſe to get me along with them.

CHRISTIAN HOFFMAN, (Sworn.)

I lived with old Shitz before his death. About ſix weeks after he died, Hauer came to the houſe; he told me ſomething came to his houſe every night, and it was half white and half black, and called his (John Hauer's) wife three times by her name. I ſaid to Hauer, I wonder what that can be for. Hauer ſaid,—I think, if old Shitz HAD DIVIDED HIS ESTATE, SHARE & SHARE ALIKE, IT WOULD NOT BE SO.—I ſaid I could tell nothing about it. Hauer told me to tell the boys this. I did tell them. It is about three years ago. This time three years ago, at hay-making, Hauer came to work for Francis Shitz. After ſupper, he bade good night, and went out of doors. After the family had gone to bed, ſomething came in the houſe, and rattled and made a great noiſe. Francis Shitz went down and looked, but ſaw nothing. He came up ſtairs again. After a while it began again, and ſeemed like the rattling among old iron. Francis Shitz came to my bed, and told me to go down, and look what it was. I went down ſtairs; and went from the ſtair-caſe to a ſmall chamber adjoining the room. From thence I went into the room. From the room I went into the kitchen—I could ſee nothing in the kitchen; but there is a ſmall room under the ſtair caſe—not very large. I opened the door of it, and reached into it with my hand, and caught ſome perſon on the breaſt: I perceived it was a HUMAN BEING, and dragged him out—and it was—JOHN HAUER! Then, when I got him out, he laughed. I aſked him what he was doing there. He told me I ſhould not tell the boys; but I did tell them.

Hauer told me it was the ghoſt of old Shitz that had come to his houſe; and he told me if I did not believe it, I might come and ſee it.

The will of old Peter Shitz was then read in evidence to the jury. It was dated on the 8th of April, 1795—and proved on the 30th of April, 1795. Immediately on the death of Peter Shitz, Hauer entered a CAVEAT againſt the probate; but not being able to lay any ground to conteſt the will, he

relinquiſhed the CAVEAT by letter to Andrew Forreſt, Eſq. the regiſter of wills, in Dauphin county, on the 29th of April, 1795. Shortly after which the ghoſt was firſt conjured up, as appears by the teſtimony of Chriſtian Hoffman.

Doctor JOSEPH STAUSE, (Sworn.)

The laſt battalion's day, the 18th of October, 1797. Hauer and his wife came to me, at my ſhop in Lebanon. Mrs. Hauer wiſhed to be bled. I did bleed her. Hauer aſked me if I had not in my ſhop, a medicine, which he called WIEDERKOMME drops. I told him I had not; nor did I know any medicine of the kind. He told me if I had them I ſhould not be afraid to give them to him; he meant to do no harm with them; If I would let him have about a gill, he would give me TWENTY dollars. He then ſaid, he was convinced I had thoſe kinds of drops, as he had got them from other phyſicians before; that he knew phyſicians generally objected to ſell them. I told him I really had nothing of the kind, or I would give it to him with pleaſure if I had them. He then ſaid he was convinced I had them, and if I would let him have a gill he would give me TWENTY pounds. I told him I really had not the medicine. He then aſked me if I would not write to the city, and get them for him from the apothecary. I promiſed him I would, in order to get rid of him; and he and his wife went off. About two weeks afterwards, he came to me again, in company with Pat. Donagan, and aſked me if I had got thoſe drops for him. I told him I had not, I had no opportunity of writing. Pat. ſaid he was convinced I had them in my ſhop, and would not give them to him; he ſaid he had got ſome previous to this at Bethlehem; and ſome of Dr. Luther. I declared to him I had them not. Then Hauer pulled out a bag of money; he ſaid it contained FIFTY pounds; I believed it did, for it was a large bag of dollars. He then told me, if I would give him a gill of thoſe drops, he would give me that money. I told him as before, I had not got them. I aſked them to deſcribe the colour and ſmell; perhaps I would know what they wanted. Hauer could not deſcribe the ſmell; but he pointed to a bottle that was ſtanding on one of the ſhelves, which was of a dark brown, and ſaid it had that colour. I told him I did not know by his deſcription what it was.——Pat. then began to talk. He ſeemed VERY ANXIOUS and PRESSING to have thoſe drops; and ſaid, if I would get him the drops, he would ride up to Harriſburgh, to Dr. Luther, and get the Latin or Engliſh name of them, that I

might ſend to Philadelphia for them; as I did not know the German name. He ſaid Dr. Luther muſt know the name of them, as he had got ſome from him before, BUT THEY WERE NOT STRONG ENOUGH.——I told him if he would do that, get me the Latin name, I would certainly get him the drops from the city.—On this they left me.—I aſked them what the intention of them was—what they wanted them for. They ſmiled and did not tell me. I ſaid to Pat, I ſuppoſe you want to try projects with theſe drops. He ſmiled, and ſaid, yes. Pat. appeared to me to be far more ſolicitous to have them than Hauer. The colour in the bottle they pointed at was very much the colour of LAUDANUM.

CROSS EXAMINED.

It appeared to me extraordinary, ſo much money being offered; and I mentioned the circumſtance to Frederick Hubley. They laid me under no injunctions of ſecrecy.———As an apothecary, I would have ſold a gill of LAUDANUM for a dollar. But I would give no man a gill of LAUDANUM, unleſs I knew what he wanted to do with it, or could judge of the effects of it.——I ſell large quantities of ARSENIC; I would have ſold them an ounce of that for ſix pence: that would have been enough to kill any man. The Germans buy a good deal of it, but they do not aſk for it by the name of ARSENIC: They generally come for RATS-BANE.

JOHN FOX, (Sworn.)

I was aſked by Squire Shæfer to carry Hauer to goal. When we were on the road, I ſaid to him, John, this is a very bad affair which has happened; and you ſeem very much to be blamed; and it would be my advice to you, if you know any thing about the buſineſs, to inform of it. Tell me or ſome other perſon, it will be a benefit to you. He ſaid he was clear of it, he knew nothing about it. I travelled on with him a mile or two, and put the queſtion again, and told him it would be much in his favor, for, by the judgment of the whole neighborhood, he knew ſomething about it. He then aſked me, if it would clear him in caſe he would turn ſtate's evidence. I told him it certainly would, and it would be his beſt way to inform, if he knew any thing about it. I will ſay nothing more, ſaid he, till I ſee a lawyer. I told him a lawyer could do him no more than another. He gave the ſame anſwer again. We came riding on———I ſaid, John, I wiſh

I could come up with the two villains, that I might get the 500 dollars that are advertiſed. He ſaid, if I could get bail, and go over the river with you, to night, we could get them 500 dollars. Well, ſaid I, John, who have you ſuſpicions of? He ſaid, I have ſuſpicions of Peter M'Donough. I aſked him what reaſons he had to ſuſpect Peter M'Donough. He told me, that Peter M'Donough had aſked him if the Shitz's had a good deal of money by them. That at another time he had told him he never would work any more, and he would live very well. And, he ſaid, Peter M'Donough was at work over the river, and he could get him that night, and aſked me if I would be one of his bail. I told him we would ſee about it when we got to Harriſburgh. We came to Harriſburgh. He wanted to ſee Mr. Fiſher. Mr. Fiſher was not within. His next choice was Mr. Patterſon; he was not at home. He then made choice of Mr. Laird. Mr. Laird came down with me to Mr. Zeigler's. We took him into a back room. Mr. Laird told him it would be prudent to tell every thing he knew about the buſineſs. Hauer aſked Mr. Laird, if it would clear him, if he would turn ſtate's evidence. Mr. Laird told him the Court could not pardon him, it muſt depend upon the governor. He would then tell nothing, and I put him to gaol.

The confeſſion of John Hauer was next read to the jury; in the following words, as it was taken down, and ſigned by him, before the preſident of the Court.

DAUPHIN COUNTY, }
SECOND DISTRICT, ſſ. }

The depoſition and examination of John Hauer late of Heidelberg townſhip in the county of Dauphin, farmer, now confined in the jail of the county of Dauphin aforeſaid, and upon his trial in the Court of Oyer and Terminer and general jail delivery holding for the ſame county, for the murder of a certain Francis Shitz, his brother-in-law, taken before John Joſeph Henry, Eſquire, Preſident of the ſame Court, and John Gloninger, Eſquire, one of the judges thereof, this ſixteenth day of March in the year of our Lord 1798. The examinant ſaith, that he and Patrick Donagan talked about Peter Shitz having [committed ſome offence, of which there is no teſtimony; it is therefore improper to inſert it] that Donagan ſaid it would not be too bad to kill ſuch a fellow—examinant ſaid to him, he would kill no one

unleſs he was overcome with rage—Oh, ſaid Donagan, for a few hundred pounds I would get hands to put both away—examinant need not look about him for it—examinant agreed to it. Donagan told examinant he ſhould mention it once to Peter M'Donoughy—examinant ſpoke to him of it accordingly, in the new barn at Illigs, where he was eating grapes—M'Donoughy ſaid he did not like to do it, but he would mention it to his brother Hugh M'Donoughy. Afterwards Peter and Hugh M'Donoughy went down to Hacks, where Charles M'Manus was digging a mill race to ſpeak to him, whether he would not be concerned: This was about oat-harveſt. Charles M'Manus came up, and he and examinant rode over to Peter M'Donoughy's in the night time. Upon talking of it that night they gave up the ſcheme. At that time examinant had not informed Peter M'Donoughy nor Charles M'Manus of the names of the perſons to be killed. The matter was thus depending till flax breaking time, which was the week after the laſt Supreme Court at Harriſburg—Then Peter M'Donoughy's wife came over to examinant's houſe and called Patrick Donagan away from the flax-break. He, Donagan, went with her to her huſband. There they agreed how the murder ſhould be done. When Patrick Donagan came home he told examinant the manner they ſettled to do it. He ſaid Peter M'Donoughy, Hugh M'Manus and one Patrick (who is now in town here) would commit the murder. But that Hugh M'Manus and THAT Patrick would have one hundred pounds in caſh after it was done, which Donagan muſt pay them. The affair, then, went to nothing becauſe Patrick Donagan did not get the money from Illig who owed him money. Peter M'Donoughy in the ſame week gave Charles M'Manus nine pounds to purchaſe the piſtols and knife at Lancaſter. It thus depended for a time, and as Charles M'Manus told examinant, he had informed Francis Cox, James Evans, and a ſhoemaker who lives in Manheim in the county of Lancaſter of it. The ſhoemaker and Cox, as Charles M'Manus ſaid, were to go with him to Geiger's tavern, if it was neceſſary to be witneſſes that he remained in the houſe. In the winter afterwards when examinant and Patrick Donagan, were cutting wood in the woods, Peter M'Donoughy and Charles M'Manus came to them. It was then concluded between them to commit the murder on the night upon which it was afterwards executed. Charles M'Manus propoſed that the people in the houſe ſhould all be murdered and the houſe burned that no jury could be had on their bodies. To this

Peter M'Donoughy agreed; but Patrick and examinant would not agree to it, becauſe of the guiltleſs perſons who were in it. Indeed Patrick Donagan always ſaid he himſelf could not undertake it, it was againſt him, but he would get people to do it, and ſo he did too—Peter M'Donoughy had money due to him from one Elſer, on Middle creek, with which he purchaſed a mare from one Frederick Bollman in Meyer's-town, to give to Charles M'Manus that he might go away with after the murder. In the winter juſt before Chriſtmas Peter M'Donoughy and Molly Farley rode down to Manheim to Charles M'Manus to ſpeak to him about the murder. Peter M'Donoughy afterwards told examinant that Charles M'Manus ſaid, if examinant would give it up, he, Charles, would ſhoot him through the head. Peter M'Donoughy ſaid they would meet at Lebanon. Examinant went to Lebanon, on that day which was the Sunday before the murder, where he put up at Bowman's tavern. Charles M'Manus came thither, examinant told him nothing ſhould be done. Examinant ſaid nothing to Peter in Lebanon, but he overtook them as they were watering their horſes in Quittapahilla—they ſtopped at Geiger's tavern. When they left Geiger's, examinant told Charles M'Manus the murder ſhould be given up. Upon this Charles ſaid to Peter, if this is given up, then we will rob Graybill and Shenk of their money. The next day Charles M'Manus went to Peter M'Donoughy's, when the affair was begun afreſh. Patrick Donagan told this to examinant, and ſaid if it was not purſued up they would kill examinant—upon which examinant ſaid to Patrick, he was bad off; if they do it, he would be hanged—if he refuſed, they would kill him. Patrick told examinant to get ſome perſon into the houſe with him who might be witneſs of his being at home—Patrick Donagan told examinant that as a token for Charles M'Manus, Peter M'Donoughy was to lay a handkerchief in the horſe-trough if ſtrangers were in the houſe when he came there on the night the murder was to be committed; if no handkerchief was in the trough, he might come ſtraight in; and that he would get out of the houſe by a hole in the wall. Molly Farley took a piſtol and two candles which Patrick Donagan gave her, to Peter M'Donoughy's houſe; but examinant does not know that ſhe knew of the intended murder. On the night of the murder the examinant was not out of his houſe, he was at Shæfers-town that day, and took George Baker home with him, who he really wanted to threſh oats, and alſo to be a witneſs for him, if the murder took effect that

night, which examinant was ſtill doubtful of—Since coming to jail he aſked Patrick Donagan how Peter M'Donoughy got out of the houſe; he ſaid it was all one; but if examinant diſcovered he would go to the Gallies and they would be hanged—Since coming here the examinant has had no converſation with Peter M'Donoughy about the murder—and he had no opportunity to ſpeak to Charles M'Manus.—That at this time the examinant does not recollect any thing more particular and material of the matter.

JOHN HAUER.

Sworn and ſubſcribed the day and year firſt above written, before us,

JOHN JOSEPH HENRY,
JOHN GLONINGER.

JACOB MILLER, (Sworn.)

This witneſs was called to prove that Pat. Donagan was in company with M'Manus, when he had the two piſtols, one of which was afterwards found in the houſe of Fr. Shitz. (See his evidence on M'Manus's trial, from which he did not vary.)

CROSS EXAMINED by Mr. Hopkins, he ſaid——

Patrick Donagan did not countenance M'Manus in oppoſing me in any way. James Logan and his wife were in the ſame room. Pat. Donagan kept his home at Hauer's. I have ſeen Donagan and M'Manus frequently aſſociating together. I have been in the tavern drinking with them too; but I thought no harm of it.

Hauer and Donagan were very intimate, and frequently rode together.—But it is not uncommon for a perſon who boards with another to go backwards and forwards with him.

The conviction of Charles M'Manus as principal, read to the jury.

MATTHIAS ORNDORF, called.

MR. HOPKINS. Are you a doctor?

WITNESS. I am a ſort of a doctor—I want to ſay it in Dutch I can't ſpeak good Engliſh.

COURT. You can ſpeak well enough—you muſt tell your ſtory in Engliſh, as well as you can.

WITNESS, (Sworn.)

It is about a year, or not quite, or may be longer, Pat. Donagan came to me, and ſaid he an't well, he got it in his ſtomach, in his limbs, he is quite weak, if I would not know any thing that would be good for him.—So I tell'd him, yes, I think a phyſic would be good for him. So he ſaid a few words, I don't know rightly myſelf what it was, and went off, and didn't take no phyſic. In about 8 or 10 days after that, he came again, and told me he believe he'll take a phyſic along now, and ſo I give him one; a phyſic, what you call it, a julap powder; and when he went away from me he met with old John Shenk. PRESIDENT. How do you know that? WITNESS. He told me himſelf. Then he told old John Shenk his ſickneſs, that he has it in his ſtomach, and was very weak. So old John Shenk told him he ſhould go along with him, he had a vomit that would be better for him: and he took it, and he told me he is ſicker. I told him to take the phyſic now. So he took it now, and came again, and ſaid he was no better. So I ſold him SOME YERBS—ſage and cammomile.——

In ſeeding-time, a good while after, he came to me again, I was plowing in the field, and aſked me if I had no drops called "WIEDERKOMME DROPS" I told him no, I never heard the name of it that I know'd. He ſaid, I thought you had. I aſked him what uſe they are for. He ſaid they were drops to take in vardly, to make a man ſo light as drops can make him. I told him I had ſome drops that would make a man ſo light, but I don't call 'em WIEDERKOMME DROPS, I call 'em ſtomach drops.—He ſaid, no, no, them an't the drops. I aſked him if he ever had any ſuch drops. So he ſaid, yes. I aſked him where he got 'em. I think he ſaid he got 'em once from Dr. Luther, but that was not the real ſtuff.—I told him I don't think there are ſuch drops: he ſaid yes, he knows who got ſuch drops. I aſked him who got ſuch a drops: he told me old Fahnſtock: he was down by old Fahnſtock, and aſked him for ſuch a drops, and old Fahnſtock looked down on the floor,

and look up again, and laughed a little, but ſaid nothing; and he thought he laughed and made fun of him, and then he went away. Then he aſked me if I would not ride down for him to old Fahnſtock's, and get him a gill of ſuch drops: I told him no—He aſked me why? I told him I don't like it, I AM A SORT OF A DOCTOR TOO. He told me I ſhould go; it was too far to the apothecaries, but not far to Fahnſtock's and he would give me £.10 if I would get him a gill of ſuch drops. I laughed at him, and he laughed along. I told him them are dear drops, they muſt not juſt be for taking in. Yes, ſurely, ſurely, ſaid he, they are for taking in. I told him, may be, by and by, I'll ride to Lancaſter, and if the apothecaries had ſuch, I'll fetch ſome up. He then ſaid, that was too far, but if I would go to Fahnſtock's, he would give me £.25 if I would fetch him a gill. I told him, no. Then he ſaid, if you'll fetch me a gill of them drops, I'll give you ONE HUNDRED DOLLARS, or a brown horſe. I told him, I had not time. He ſaid, you can loſs a day for ſo much money. I told him I don't like to go from ſeeding. So I promiſed him to go in 8 days after that. When them 8 days were over, he came juſt on the day. Then he aſked if I was down. I told him no, I had not time yet. So he aſked me when I would go down now. I told him, may be in 8 days, or there abouts, may be I get better time. So when the time was over, he came juſt pretty nigh on the day. So he aſked me if I were down. I ſaid no, I had not time yet. So he ſaid, you makes very long. So he aſked me when I would go now. I ſaid in 8 or 10 days. So, when the time was over he came again. He came another time, when I was threſhing. He aſked me if I was down. I told him no. So he ſeems VERY ANGRY AT IT. He told me, if I would not look for ſuch drops, he knows ſomebody that will get them; but he likes to give me the money ſooner as ſomebody elſe. So I promiſed him then to go down the next day. So he told me, may be your horſes are tired; you can ride one of mine; and he took of the ſaddle and bridle off his own horſe, and let him go in the yard. The next day I went to Fahnſtock's. When I came home, he came the next day. So he aſked me if I got ſuch a drops. I ſaid no. He aſked me what Fahnſtock ſaid: ſo I told him. He ſaid old Fanſtock was a jockey, and did not like to give them away.

At an election in Shæfer's-town; for I don't know what, a captain or a major—I don't know—The Church was conſecrated about that time. Pat.

was in the town. Old Kapp was ſick. Old Keller did DOCTOR Kapp. Pat. came to me and told me old Keller was in the town, and told me to go to him and aſk HIM for ſuch a drops. So I went to him. When I came back, Pat. aſked me what he ſaid. So I told him. So he ſaid old Keller was a right old jockey, he did not like to give the drops. Hauer was in the town too. Then Pat. and Hauer went together in Stoler's tavern in Shæfer's-town. They ſpoke together. One of them ſaid, I think it was Hauer, if £.500 wont do it, £.1000 muſt. I heard them ſpeaking of the WIEDERKOMME DROPS.

After this I met Pat. He put his hand in his pocket, and gingled money, and ſaid here is £.50 if you get ſuch drops.——

CROSS EXAMINED.

I was two yards, or thereabouts from them at Stoler's, when they were ſpeaking of the drops. It was in the back room; there was a good many there, I can't tell if any body elſe was as nigh as I was; other people might have heard it. They were ſitting.

I got no receipt from Dr. Keller for the WIEDERKOMME DROPS. He ſaid if I came down to him, he would give me a few lines how to make them. He told me nothing about ghoſts.

The Court and jury being greatly fatigued, adjourned at 9 o'clock at night. Four bailiffs were ſworn to keep the jury together, according to the precedent of the KING AND STONE 6 Term. Rep. 530.—

Saturday, June 16th. The Court met at 8 o'clock, A. M.

DR. JACOB KENIGHMACHER, affirmed.

PATRICK DONAGAN came to my houſe at Ephrata, a few weeks before Chriſtmas—in company with one Hugh Tamminy and he aſked me if I had any WIEDERKOMME DROPS—I told him no, it was a medicine that never came to my knowledge, and I would look through ſome of my books to ſee if I could find out what it was—he then told me he KNEW who had them, it was old Dr. Tryon; he knew that he had about a quart of it in

his houſe at that time; that he had ſent a perſon there, but he did not get any; he knew that if I was to go up, I could get them; and if I would get a gill, he would pay me for my trouble £.25 or he would pledge it in a neighbour's hands, as he did not wiſh I ſhould go to any trouble for nothing for him; and he would bind himſelf in the ſum of 1000 or 10,000 dollars, I don't recollect exactly, that he would not HURT A LIVING CREATURE WITH THEM; and if I intended to undertake it for him, he would return towards evening again; I ſhould take it into conſideration. He then went off, and returned in the evening again, and aſked me then whether I would undertake it for him—I do not recollect what anſwer I gave him, but I did not like to have any thing to do with it; and he went off. It ſtruck me as being very ſtrange. I don't remember that I aſked him what he intended to do with theſe drops, but he appeared very anxious for me to get them for him. He mentioned ſomething about Fahnſtock and Keller, but I forgot what.

CROSS EXAMINED.

He did not enjoin ſecrecy upon me—Hugh Tamminy lives a quarter of a mile from me. He was preſent during all this converſation—he is a tolerably reputable man—He went away a little before Pat.

PETER SHITZ, (Sworn.)

Three years ago againſt next harveſt, my brother Francis went to haul ſtones for the new church at Shæfer's-town. When he came home he could not unhitch his horſes. He thought the reſt of us were not ſo ſick, that we might do it; and he ſent for us to the field, where we went to rake oats to feed the horſes, but we could not do it. Hoffman and the girl, that is now his wife, and two other girls, and Hoffman's ſon John, were in the field. We were all ſo ſick we vomited all the time. Hoffman was not quite ſo ſick as the reſt of us, and he fed the horſes. The vomiting continued all that day; and the next day we felt very weak. Hoffman's wife, who was then a maid in the houſe, cooked the breakfaſt that day; it was coffee and bread and butter. We never had been affected ſo before. I don't know if any ſtrange perſon had been about the houſe that day. Hauer often came there about that time; I cannot tell how often; but he went about the houſe wherever he pleaſed.

Laſt fall was a year I had hired myſelf to Jacob Shitz, my father's brother's ſon, at Tulpehocken. Hauer, with whom I then lived, had gone over to Francis Shitz's. When he came back, I told him I was going on Sunday to Jacob Shitz's. On Sunday it rained, and I could not go. Hauer then told me I ſhould not go, that he would ſhow me a way how I ſhould get a purſe every morning that would have five doubloons in it. That he himſelf could not get it, but that I could. I ſaid to Hauer that I could not get it. Hauer then ſwore unmercifully that I could; and he told me he muſt fetch drops from Lebanon. He went on Monday up to Lebanon. When he came back again he ſaid one ſort was WIEDERKOMME DROPS, the other I don't know what it was he called it. He had three bottles, one was bigger than the other two, which were but ſmall phials. Hauer ſaid, now we will try ſomething. I ſaid I did not wiſh to do it, I would rather not. Hauer told me I ſhould try it, he would be bail to me nothing ſhould happen to me. Hauer told me that Shæfer and Bomberger [they were the executors under Peter Shitz's will, and the guardians of young Peter] wanted to bind me out, that they were at his houſe, and wanted to get me, and told him they would have me dead or alive. He ſcared me ſo much that I hid myſelf; becauſe he ſaid they came every day. I told Hauer he lied. He ſwore again unmercifully, that he did not—I then kept myſelf concealed ſtill. Then Hauer ſaid, we will try to get the purſe; and he drank ſome of the drops; and I drank ſome of them too. He drank out of the big bottle, which he ſaid were WIEDERKOMME DROPS, I drank of the ſame. I drank alſo out of the TWO SMALL PHIALS, but I don't know if Hauer drank any out of them or not. I did not ſee him do it.—Then Hauer ſaid he would not try that night, he thought it was not worth while.

Some time after this, we went together down to Wolferſberger's barn. Solomon Hauer went along with us. John Hauer ſaid, if we would not do as he told us he would give us an unmerciful beating; if we would not tie ourſelves up as he told us, he would ſhow us ſome other things. He then told us that we muſt tie ourſelves up on the loft, with halters round our necks, and faſten the rope to the joiſt; that then he could tie that one who was to bring the purſe in the ſame way. When I had tied myſelf, and faſtened the rope to the joiſt, Solomon told me he would hold me; and then he gave me a puſh down. The rope was round my neck; the end faſt to the

joiſt above. The rope was not long enough to reach to the floor. The rope broke, and I fell down on the threſhing floor. The rope was as thick as my little finger, and it was doubled. It had been uſed for a plow line, and to tie the horſe. I did not ſee the man with the purſe. The rope was doubled round my neck. The joiſt is 11 or 12 feet above the threſhing floor. The rope took the ſkin off my neck, but did not hurt me much. Solomon ſaid he would tie a rope round his neck, but he did not do it. Soon as Solomon puſhed me down, he jumped down and ran off. I went home to John Hauer's houſe. In about 15 minutes after, John Hauer and Solomon Hauer came in together. They ſaid they were very ſorry that it happened ſo that all went wrong. After that Solomon aſked me to go towards Bethlehem with him, where he lived. John Hauer told me I ſhould go along with him, that it might not be found out that the ſkin was off my neck. John Hauer often told me I ſhould tell nothing of it, and I promiſed him I would not. When I came from Bethlehem I hired myſelf to my brother Francis, and Hauer again told me not to tell. I then lived with Francis almoſt a year, till he was murdered.

Patrick Donagan lived at Hauer's. Whenever I went there laſt Summer, he and Hauer would go out together and whiſper ſomething.

CROSS EXAMINED.

I tied the rope round my neck myſelf; John told me to do ſo. Solomon never told me to do it. I never aſked Rachel Hauer to bring me ſome WIEDERKOMME DROPS from Bethlehem. I was about 14 days at old Hauer's houſe, with Solomon, and I went once a ſhooting with Jonas Hauer, for ducks, down at Bethlehem. I never ſaid to any one that all would have gone right, but Solomon was ſo curſedly frightened.

I did not aſk Jonas Hauer to buy drops for me at Bethlehem.

I never ſaw Francis Cox before my brother's death.

[See his evidence, and his account of his miraculous eſcape, on the trial of M'Manus.]

JACOB MEHS, (Sworn.)

I was at Shæfer's-town one day. John Hauer told me Peter Shitz was crazy. I ſaid, I never heard any thing like that, and we lived cloſe together. He ſaid, yes, it is true; he has laid in the barn a couple of nights. I ſaid, that can't be, the winter is cold, he would freeze. I ſaid he ſhould take care of him, or tell Shæfer, for fear ſome misfortune might happen to him. He ſaid, what ſhould I trouble myſelf with him for? I have had trouble enough already—That is not the worſt yet, he ſaid; I wanted to go down to Wolferſberger's, and I went paſt the barn; and when I came to the barn, Peter Shitz was juſt hanging himſelf, and I cut the rope, and gave him a clout with my fiſt, ſo that the blood ſpirted from him. He ſaid if I did not believe it, I ſhould go to Wolferſberger's barn, and there I would ſee the blood yet.

GEORGE WOLFERSBERGER, (Sworn.)

Some time laſt winter was a year, in February, John Hauer came to my houſe. He told me to take care a little, for, ſaid he, Peter Shitz went down in your old barn; that he is ſometimes out of his head. That Peter went down twice, and he thought he would hang himſelf there. That ſometimes he had a piſtol in his pocket, and ſometimes a rope; and that the ſecond time he went down in the barn, he went after him; and when he came there, he called him twice, but Peter would not give an anſwer at all. I had a load of clover hay in the upper part of the barn above the threſhing floor, for making clover ſeed. Hauer told me he climbed up, and hunted Peter in the clover hay, and found him there, and pulled him out, and gave him a knock, and he fell down on ſome ſheaf oats I had on one ſide of the threſhing floor; that he jumped after him, and Peter got mad, and wanted to ſtrike him, and he gave him another knock, and Peter fell down in the threſhing floor, about four feet from the oats; and if I did not believe it, I might go up, and ſee the blood on the threſhing floor. I went up the next morning, and ſaw a great heap of blood lying there, and a piece of a rope, about four feet long, lying near the blood, which appeared to be about a GILL or an HALF PINT.——He ſaid Peter would kill himſelf there. The barn is an old barn, about a quarter of a mile from my houſe, and not much uſed.

PHILIP CAFFERY, (Sworn.)

[See his evidence on M'Manus's trial, which he repeated on this trial almoſt word for word.]

In addition he ſaid:——

M'Manus told me it would not hurt me at all, I was only to ſleep in the houſe along with Cox.——

We were but a few minutes in Cox's houſe. I had no converſation with Cox that night, I went home with my employer.

The next time I ſaw Cox, he aſked me if I would DO WHAT THEY WERE TALKING OF BEFORE.

M'Manus was in the ſhop after this, getting ſhoes mended; Francis Cox was with him once or twice.

As far as I can recollect, Charley was to go out of the houſe, and I was to ſleep there along with Cox.

I have known Cox ſince May two years, when I ſailed with him in the ſame ſhip from Derry. I never ſaw Donagan but once or twice that I knew him from another man.

CROSS EXAMINED.

M'Manus and I were talking QUITE EASY. Cox and Bretz were about a rod before us, talking QUITE LOUD. But whether they were talking loud, or talking at all, when M'Manus and I were talking, I can't recollect. I can't ſay whether Cox heard our converſation or not.

JACOB GEIGER, (Sworn.)

[See his evidence on M'Manus's trial, which he did not vary from, but related his ſtory in the ſame manner, and nearly in the ſame words.]

He added as follows:——

The mare M'Manus had was a little blackiſh mare. Charles M'Manus

told me he bought the mare at one Bollman's, at Meyer's-town, and gave £.39 15s. for her.

Hauer came to my houſe, the Sunday before Chriſtmas, with Charles M'Manus. I did not know Hauer then, but I knew him again when I ſaw him in the bar laſt Court. Hauer ſaid he would not have come to my houſe if it was not for Charley. They drank a bowl of hot toddy together.—Hauer ſaid Charles M'Manus was as good company to him as ever was; that he was the beſt Iriſhman that ever was. M'Manus ſaid he wanted to ride a piece along the road with that gentleman, meaning Hauer, and they went off together. M'Manus had the little blackiſh mare; he ſtayed away about an hour, and came back and ſtayed at my houſe all night.

CROSS EXAMINED.

I have got three or four pair of ſlippers. I only offered ſlippers to the Jerſeymen who had boots; I did not offer ſlippers to Cox. The two other Jerſeymen took their ſhoes up with them.

After we had done ſearching, Brown went up to bed as well as Cox; the two Jerſeymen ſtaid up with me.

I went up ſtairs the ſecond time about half after eight o'clock. I don't think Cox had time to have been in a ſound ſleep: For between the two times of being up I had only time to run round the barn. The firſt time I went up he was not aſleep; he then told me Charley had the belly-ache.

It was about 8 o'clock when Charley left my houſe. The wiſkey was almoſt out the firſt time I went up.

I had lent Charley a ſaddle on the Saturday of December Court, and he returned the ſaddle when he came with Cox; but I had money to the worth of it in my hands.

Charley had no handkerchief round his head when he was in bed; but Cox told me he had given him his handkerchief when he complained of the belly-ache.

MARY GEIGER, (Affirmed.)

See Jacob Geiger's evidence, on M'Manus's trial, which ſhe corroborated in every particular. She alſo related the ſame circumſtance with reſpect to Hauer and M'Manus, and their converſation at Geiger's the Sunday before Chriſtmas. In ſome matters ſhe was a little more minute than her huſband, but varied from his ſtory in nothing.—On the night of the murder, ſhe ſaid, that when they had all gone to bed, ſhe had waſhed up her diſhes, and faſtened and locked the door, and, having left her huſband cleaning the boots, ſhe went into her little chamber to make her bed, but had not been long there till ſhe heard the rattling at the door, mentioned in the former evidence. That at firſt ſhe thought it was Brown, who lodged in the houſe, and had been away ſome place, and was returning home. That there was no latch on her room door, but only a bolt inſide, which ſhe had bolted. That when ſhe looked out, inſtead of Brown, ſhe ſaw M'Manus at the door.

She further ſaid, that when Cox came ſo ſoftly down ſtairs that they could not hear him, till he threw open the door, and told them that M'Manus was down there; that he had thrown ſome ſtones upon the roof, and wanted him to let him in. She ſaid Cox, SURELY YOU MUST HAVE KNOWN WHERE CHARLEY HAS BEEN. That Cox made no anſwer, but immediately went to the door and let M'Manus in. That as ſoon as he opened the door for him, he ſaid, Charley, damn your ſoul, where have you been all night, keeping us hunting you. But Charley ſaid not a word, but ſtept on, and went up ſtairs.

She alſo ſaid, that Cox did not ſeem much concerned in the hunting of Charley; he looked but very little, and kept back, and ſoon hurried into the houſe before the reſt, and went to bed.

MICHAEL KAPP, (Affirmed.)

About two weeks before March Court, Hauer ſent for me two or three times, and ſaid he wanted to ſee me, when I went to him he told me a great many things; he requeſted me to bring the Judge, before the Court, and he would confeſs and tell every thing how the buſineſs was. But I had certain reaſons for not doing it; and I did not inform the Judge of any thing that had paſſed.

JUDGE GLONINGER, (Affirmed.)

When I attended the President of the Court to take Hauer's confession, the first word he spoke, was to ask if Mr. Kapp had informed the Judge, that he wished him to call upon him that he might confess. He then informed the President that he had sent for him, and wished to make his confession. We took his confession, which he swore to and subscribed; it is the same which has been read to the jury. The next morning, in open Court, he acknowledged all of it to be true.

HENRY SHAFER, Esq.

(A paper bag with powder produced.) I found this paper and the powder in it, the night Shitz was killed, on the kitchen dresser, at Shitz's house. I was told Donagan had bought some powder at Kapp's; I took it up there to compare it if it was the same. The bag appeared to have been handled, but not much.

GEORGE KAPP, (Affirmed.)

I know Patrick Donagan. The latter end of last October, or beginning of November, Pat. Donagan came to my father's store, and bought half a quarter of a pound of powder. I put it up in a paper bag, the same way I do for every body that buys powder. [a sample of powder shown.] This is a sample of powder out of the same cask from which I sold the powder to Donagan. [The bag found in the house, shown to witness.] This looks like the bag I put up for Donagan; it is the same bigness, both the papers look a like, one like another. There does not seem to be any difference in the powder—the grain of both is alike, it appears to be the same powder. I can see no odds in it. I have no particular manner of putting up my bags: but this kind are cut two off a sheet. I always make them of this shape.

Neither John Hauer, nor Francis Cox, nor Peter or Hugh M'Donough nor Elizabeth Hauer purchased any powder of me.

CROSS EXAMINED.

I live half a mile from Shitz's. I cannot swear that I made this bag; I never said I made it, but it looks like the bags I make. I never took

notice how other people make their bags. I get all my paper from Thomas Boyd; there is ſometimes an odds in it. I do not know whether I got all he had of that ſort, he ſent it to me. If any one elſe had got powder in one of theſe bags, I could not undertake to ſay which Pat. had bought, and which the other had bought. I bought my powder from Martin Dubs, in Philadelphia. I do not know that I bought all he had. I believe other ſhop-keepers about Lebanon, deal with Dubs alſo. Rex ſells gun-powder.

Squire Shæfer came to me after the murder, with the paper of powder that was found in the houſe; I then told him Pat. had bought ſome from me. I had ſold no powder to C. M'Manus; I think I ſhould have recollected it if I had. I never ſaid it was a man of the name of Peter that bought this powder.

It was about ten days or two weeks after the murder, that Shæfer called with the bag of powder. I can't ſay with certainty who elſe bought powder about that time.

JAMES EVANS, (Sworn.)

I know M'Manus and Donagan. They were at my houſe together laſt winter was a year. Pat. wanted Charles to join him in quarrying ſtones. They agreed to work together.———

MELCHOIR RAHM, (Sworn.)

The 9th or 10th of May, in the evening, I was juſt going to bed. My wife called to me to come out quickly—ſhe thought the priſoners were fighting. I got the key, and went in as ſoon as I could. When I came into the room, they were all laying down very quietly, except Cox, who ſat on a little ſtool. I aſked them what was the matter. One of them anſwered, nothing. I looked at Cox, and ſaw a mark of a ſtroke in his face. I aſked him what was the matter. He ſaid, ſome of theſe men have ſtruck me, I don't know who they were, it was dark. I aſked him what was the difference. He ſaid he did not know whether they were going to murder him, or what they were going to do with him. Patrick Donagan got up, and ſaid, it was me done it. I was laying down aſleep here, and Solomon Hauer along ſide of me, and Cox picked up a bench that was lying here, and throwed it quite acroſs

us: it hurt me ſo much I got up and aſked who it was; he ſaid it was Cox, and I gave him a dig aſide of his head. Cox ſaid, if I was looſe from my chains, I would be afraid of none of you. Patrick Donagan told him he could knock his damned ſoul out of him. Cox ſaid, IF YOU HAD AN AXE, YOU COULD DO IT BETTER PROBABLY, IT IS NOT THE FIRST ONE YOU HAVE KNOCKED OUT. Donagan got angry, and jumped up, caught Cox by the hair, and pulled him down. They would not quit—I parted them, and ſent for the blackſmith. Cox ſaid he would ſend for the Judges in the morning, and DISCOVER ALL THE SECRETS, LET BECOME OF ME WHAT WILL. Donagan ſaid he might diſcover all he had againſt him that was the truth, he had nothing againſt it; he ſhould either diſcover what ſecrets he had, or fight it out with him: That if Cox would not diſcover the ſecrets, and I would let them looſe, and fight it out, he would give me 10 dollars. When I took Cox up ſtairs, he told me again, that he would ſend for the Judges in the morning, and diſcover all the ſecrets.

Pretty ſoon after they came to gaol, I heard Hauer tell M'Manus to keep good ſpirits; not to tell any thing and he would be ſaved, and he hoped he would be ſaved too; and if he wanted any money, he would make him up £.100 or £.200 towards his expences to get him out of priſon.

The next morning after the diſpute, I told Donagan what Cox had ſaid up ſtairs; he ſaid he didn't care if he did ſend for the Judges ſo he told the truth.

Afterwards Cox allowed that he was wrong and had ſpoke too much, and they made it up again, and I took Cox back again to them. They appeared to be intoxicated that night.

The teſtimony being cloſed on the part of the Commonwealth,

Mr. HOPKINS, for the defendants, Donagan & Cox, ſhortly opened their defence. He ſtated, that they meant only to defend thoſe two priſoners; they were not concerned for Hauer. That they had a right to expect an impartial conſideration of their caſe. That great difficulties were impoſed upon the priſoners; that prejudices and miſrepreſentations had gone abroad

againſt them; they are apt to lay hold of the minds of men; but the jury ought to diveſt themſelves of all prejudices: they have ſolemnly appealed to their God, to try them according to the evidence. That the evidence on the part of the proſecution was inconcluſive and unſatisfactory, and not ſufficient to deſtroy the life of a ſparrow, much leſs that of a man; the whole of it is merely preſumptive—there is no direct evidence. We mean to prove, he added, that theſe men have uniformly ſupported an induſtrious, fair and reputable character, reſpected by all with whom they had any intercourſe. And that when this murder was committed, Donagan was at a reputable houſe, 10 or 12 miles from the ſcene.

GEORGE ILLIG (Affirmed.)

I have known Patrick Donagan about two years. I cannot ſay any harm of him; he behaved well as long as he worked with me. He worked with me ſix or ſeven weeks, or two months, laſt Summer. He worked thro' the neighborhood. I heard no ill character of him. He was very induſtrious, and had earned money with me. He depoſited near £200 with me, to keep for him. He came to my houſe the night of the murder. I was not at home when he came; I was at Shæfer's town, 8 miles off. I do not know any thing elſe but that he was at my houſe all night. I ſaw him go to bed: Our uſual bed time is about 9 o'clock. When I got up in the morning, I ſaw him come in the ſame door he went out of the evening before. We had to ſettle for quarrying ſtone; he ſaid he came on that account. He aſked me if I was going to Philadelphia ſoon, he wanted to ſend a letter. So I gave him pen, ink and paper, and he wrote a letter that morning. While he was writing, one Nipe, from Shæfer's-town, came for him—ſaid he was ſent for him. The man called me out, and told me what had happened at Shitz's houſe. The man told me they ſuſpected Pat. was concerned in the murder; and aſked me if he ſtaid all night. I ſaid, yes. He then went in, and told him what he came for. Pat. ſaid, my God, can it be true, or ſome ſuch words—and he DESIRED ME to give him a few lines to Squire Shæfer, that he was all night in my houſe. I told him I would go up myſelf, I was anxious to ſee how that misfortune happened. I told Squire Shæfer, I was moſt ſure he ſtayed all night in my houſe that night. They thought he was clear of it and let him go.

He did not ſeem unwilling to go. I could not ſee that he altered his countenance; nor did he run off after he was diſcharged. He was in the neighborhood for ſome weeks before he was apprehended again.

CROSS EXAMINED.

He had often ſlept at my houſe before. He ſaid he ſlept with my ſon that night. There were other beds empty in the room. His home was at Hauer's immediately previous to this.

WENDLE HYPSMAN, (Sworn.)

I do not know much of Donagan or Cox. Donagan worked in the neighborhood about three years ago. He was an induſtrious ſober man, and bore a good character through the neighborhood for what I know.

Cox had a good character in my neighborhood three or four years ago. He went to Ireland, and came back again. I never heard any thing againſt him till this.

Jacob Keller, Leonard Illig, James Douglas and Philip Caffery were likewiſe called to ſpeak of their characters, which they did much in the ſame terms as George Illig and Hypſman. The priſoners called no other witneſſes.

MEMORANDUM.

When John Hauer was brought to the bar and told to hold up his hand, he did hold up his hand; and from his whole appearance, and from a variety of circumſtances, there was no room to doubt, but that he ſtood MUTE through obſtinacy. He had previouſly enquired, if one who was crazy could be hanged. It evidently appeared that he wiſhed to be thought in a ſtate of lunacy or derangement; but he did not affect it with a ſufficient degree of art; nor was there the leaſt appearance of derangement in his eye. He kept himſelf in a filthy ſituation; would ſpeak to no one; and when any perſon would go near him, he would bite at them, and if he could reach them, he would abuſe them greatly. When brought to the bar, his appearance was very diſguſting. But no ſuggeſtion was made to the Court by his counſel, or others, that he was NON COMPOS: If there had been any ſuch ſuggeſtion, the Court would have impannelled a jury to enquire whe-

ther he ſtood obſtinately mute, or whether he was dumb *ex viſitatione Dei*. But as ſtanding mute is not now ſo penal as formerly; and as in ſuch caſe the Court are directed to enter the plea of NOT GUILTY, by act of aſſembly, they did not conſider themſelves as bound *ex officio* to impannel ſuch a jury; and it was not prayed for by his counſel, who had actually pleaded in his behalf the plea which the Court overruled.

When the evidence was all cloſed, Mr. DUNCAN addreſſed the Court to the following effect. Meſſrs. ELDER, LAIRD, FISHER and CLYMER gave the ſame reaſons to the Court for their conduct to John Hauer, when Mr. Duncan had finiſhed. Theſe five gentlemen were of Counſel for John Hauer.

The Counſel for the priſoner, John Hauer, before the Counſel for Patrick Donagan and Francis Cox, proceed with their defence, beg leave to ſtate to the Court, that on this, as well as on the former trial, they have endeavored to diſcharge their duty towards him faithfully, to the extent of their ſlender abilities. They believe that if John Hauer, on the former trial, had not thought proper to take his caſe out of their hands, probably he would not now have been in confinement. But as John Hauer ſent for the Judges, and confeſſed his concern in the very foul and barbarous murder committed on his brother-in-law Francis Shitz, and having, when brought to the bar the next morning, publicly pronounced the truth of that confeſſion, and perſiſted in it; and as John Hauer during the proceedings, and upon his arraignment, upon the preſent indictment, has remained mute; whether obſtinately, or by the viſitation of God, they pretend not to ſay; and further, has declined all intercourſe with his counſel; having attended the trial, and examined the witneſſes; they therefore, conſider it their duty to be ſilent, and now deliver up John Hauer to the Court and to the Jury; well ſatisfied that the Court will conſider and give weight to any favorable circumſtance that may exiſt in his caſe. They are induced to this meaſure from a ſenſe of its propriety, from a reſpect to the Court, and a regard to their own characters. They would, however, have it underſtood, that they have not been awed into it, by the dread of popular reſentment and fury, which may have been excited againſt them for the part which they have taken in defence of John Hauer; this they moſt heartily deſpiſe. For though HE STOOD AT THE BAR COVERED OVER WITH THE BLOOD OF HIS BROTHER,

it would have been their duty to have become his counſel; and having once undertaken his defence, not to have defended him with their beſt exertions, would have been a violation of their oaths, a baſe deſertion of a man who had put his life in their hands, and have rendered them unworthy members of a very honorable profeſſion.

Mr. ELDER addreſſed the jury on behalf of the two other priſoners; and Mr. CLYMER followed him, but did not finiſh his ſpeech; as one of the jurors had taken ill, and declared he could not ſet it out all night. Every body was exceſſively fatigued; the Court therefore adjourned at 12 o'clock at night, till 8 the next morning. Four bailiffs were ſworn, as before, to keep the jury together.

For the ſake of brevity, the ſumming up will be given as one ſpeech on each ſide, and all the obſervations will be blended together.

Mr. CLYMER for the priſoners, DONAGAN & COX.

GENTLEMEN OF THE JURY,

Although a very atrocious murder has been committed, yet I truſt the jury will not be ſo far incenſed againſt the enormity of the crime, as to diſable them from judging calmly and deliberately upon the caſe of the priſoners. In the preſent caſe I apprehend there is no evidence to ſatisfy a wary mind of their guilt. To convict, the evidence ought to be certain and ſtrong; it ſhould be ſo manifeſt that it cannot be contradicted. There is no poſitive evidence againſt Donagan and Cox; it is altogether circumſtantial and preſumptive. To convict of murder the preſumptions ought to be violent, nearly amounting to full proof; like the common inſtance put in the books, of a man found ſuddenly dead in the room, and another be found running out in haſte with a bloody ſword in his hand. But light or raſh preſumptions, ſays Lord Chief Baron Gilbert, weigh nothing. Gilb. Ev. 157—8. 2. Bac. 311. And in 2 Hale 289. That humane judge, ſpeaking of preſumptive evidence, ſays that it muſt be very warily preſſed, for it is better five guilty perſons ſhould eſcape unpuniſhed, than one innocent perſon ſhould die; which is alſo ſaid in 4 Black. 358. Lord Hale not only ſpeaks thus, but he gives us ſome remarkable inſtances to ſhow the danger of relying on ſuch evidence, and how eaſily the mind may be miſled by a variety of cir-

cumſtances, ſeemingly tending to eſtabliſh a fact, but which has afterwards been found never to have happened. I will read you theſe caſes, Gentlemen, in order to put you upon your guard againſt too eaſy a belief of ſuch evidence as exiſts in the preſent caſe; you have conſciences to ſatisfy, and I am perſuaded you will not give a verdict which, when you come to reflect upon it afterwards, will rankle in your minds to the lateſt period of your lives. You will therefore, Gentlemen, require ſtrong evidence before you will venture to take away the lives of the priſoners, you, I am ſure, will not convict upon conjecture; or where there is even a reaſonable ground to doubt. Theſe men may be guilty; that is a matter with their conſciences; it does not appear ſo, I apprehend, from the evidence. It is much ſafer therefore to acquit them. If they ſhould eſcape undeſervedly, they ſtill have their account to ſettle with their God. They may go hence, and hereafter lead the lives of good citizens; and by their good conduct atone for their former offences: The thief upon the croſs was pardoned at the laſt hour. I however, declare, that if I believed them to be guilty, I would not riſe in their defence.

"If, ſays Lord Hale, a horſe be ſtolen from A. and the ſame day B. be found upon him, it is a ſtrong preſumption that B. ſtole him; yet I do remember before a very learned and wary judge, in ſuch an inſtance, B. was condemned and executed at Oxford aſſizes; and yet, within two aſſizes after, C. being apprehended for another robbery and convicted, upon his judgment and execution confeſſed he was the man that ſtole the horſe, and being cloſely purſued deſired B. a ſtranger, to walk his horſe for him, while he turned aſide upon a neceſſary occaſion and eſcaped: and B. was apprehended with the horſe and died innocently."

"I would never," he adds, pa. 290. "convict any perſon of murder or manſlaughter, unleſs the fact were proved to be done, or at leaſt the body found dead, for the ſake of two caſes—one was thus: An uncle, who had the bringing up of his niece, to whom he was heir at law, correcting her for ſome offence, ſhe was heard to ſay, GOOD UNCLE DO NOT KILL ME; after which time the child could not be found, whereupon the uncle was committed upon ſuſpicion of murder, and admoniſhed by the juſtices of aſſize to find out the child by the next aſſizes, againſt which time he could not find her, but brought another child as like her in perſon and years as he

could find, and apparelled her like the true child, but on examination ſhe was found not to be the true child; upon theſe preſumptions he was found guilty and executed. But the truth was, the child being beaten ran away, and was received by a ſtranger, and afterwards when ſhe came of age to have her land, came and demanded it, and was directly proved to be the true child." Now, gentlemen, upon preſumptions as ſtrong as thoſe, one would ſcarcely heſitate to convict; yet we find how fallacious they were. By truſting them, you may ſometimes puniſh the guilty; but too frequently you may deſtroy the innocent. We do not pretend to ſay, that in every inſtance preſumptions are to be avoided; but we deſire to put you on your guard againſt too eaſy an attention to them. Let not the magnitude of the crime ſo far rouſe your indignation, as to induce you to liſten to circumſtances like the preſent, and by the aid of prejudice, which may ſteal upon you without your knowing it, unleſs you firmly reſolve to reſiſt it, and conſider the caſe as if you had never heard of it before, give a weight to the evidence which it does not deſerve.

The inſtances which have already happened ought to alarm you, leſt induced by ſpecious appearances, but which are yet entirely deceptious, you too, may bring innocent men to an unmerited end. It is true where the fact intended to be proved is ſo irreſiſtibly the conſequence of the circumſtances, that it could have happened upon no other principle, the human mind is bound to aſſent to its truth; but if it may or may not follow from ſuch circumſtances, it then beomes a matter of doubt and uncertainty, and we are equally bound to reſiſt it. The other caſe, gentlemen is thus ſtated by the ſame great authority. "Another caſe happened in my remembrance in Staffordſhire, where A was long miſſing, and upon ſtrong preſumptions B was ſuppoſed to have murdered him, and to have conſumed him to aſhes in an oven, that he ſhould not be found, whereupon B. was indicted of murder and convicted and executed, and within one year after, A. returned, being indeed ſent beyond ſea by B. againſt his will; and ſo, tho' B. juſtly deſerved death, yet he was really not guilty of that offence, for which he ſuffered."—We lay theſe authorities before you for your conſideration, and we have no doubt, gentlemen but that they will have the effect with you which they ought to have.—So, in 8. Mod. 249. Gilbert Chief Baron declares, that a man ſhall not be found guilty, and hanged upon preſumption.

In the caſe of the King againſt Maſon, on an indictment for maliciouſly and piratically burning a ſhip, it was proved that the defendant, who was maſter of the ſhip, tampered with the carpenter to knock her on the head; that on the day the ſhip was burnt, he made all the crew drunk, and then ordered a fire to be made in the cabin, where there had been none for a month before that time, and the defendant and moſt of the crew then went on ſhore, except two, who were very drunk; that there was but one bucket belonging to the ſhip, which the defendant had ordered a ſailor to fling overboard the day before the ſhip was burnt—Upon this evidence, ſays the book, the preſumption was very ſtrong, that the ſhip was burnt by that fire which was firſt made in the cabin; but this being only preſumption, and no direct proof, the defendant was acquitted. 8. Mod. 74. And in the ſame book, pa. 66, we find the caſe of the King againſt Sprigg and Oakley thus reported: "The defendants were tried at the Old Bailey upon an indictment for PIRACY, in ſinking a ſhip near the Iſle of Man.—The evidence was thus: Sprigg bought this ſhip, and made the other defendant, Oakley, maſter thereof; and having freighted her, he inſured £.500 on the ſhip, and £.400 on the cargo, to the Weſt-Indies. Afterwards they put to ſea, and run the goods upon the coaſt of England. They put to ſea again; and about two days afterwards the ſhip was ſunk; and then he proteſted at the next port, that both the ſhip and the cargo were loſt.

The proof againſt the maſter was, that the day before this ſhip was loſt, he took notice that the ſhip's boat was out of repair, and deſired ſome of the men to ſtop the chinks therein, for that he did not know how ſoon they might have occaſion to make uſe thereof: that the next day he deſired one of the ſailors to ſee how deep the water in the pump was, who in a quarter of an hour before had pumped till it was no more than two inches deep; but now, to his great ſurprize, found it ſeven inches deep; thereupon he, and the reſt of the ſhip's crew began, and continued to pump, but ſtill the water became higher in the ſhip, and within half an hour was fifteen inches high: that thereupon the ſailor who firſt pumped, and ſome of the reſt of the ſhip's crew, offered to go down into the hold, but the maſter would not ſuffer any of them to go down, nor any body to be there beſides himſelf and Sprigg, who was all the time below, which was proved by the ſailors; and that the water could not flow in ſo faſt, unleſs the ſhip was bored, or broken in the bottom

The proof againſt Sprigg, the owner, was, that a day before the ſhip put to ſea he bought an auger which was an inch and an half wide in the bore; that the ſhip had augers enough before, and that there was no manner of occaſion for ſo wide an auger; and that he was under the deck all the time the ſailors were pumping, and, as they believed, boring the ſhip.

"But THE EVIDENCE BEING ONLY PRESUMPTIVE againſt both the defendants, they were acquitted."—

Gentlemen, I have cited theſe caſes to ſhow you, how little regard is paid to evidence of this kind in capital caſes; and that the lives of men are not to be ſported with upon mere preſumptions; and altho' the evidence in thoſe caſes were ſufficient to ſatisfy almoſt any mind, yet being in the caſe of life, with an humane and wiſe caution, it was thought proper to acquit the defendants. Thus you ſee, gentlemen, what the rule is, and ought to be in thoſe caſes; and if you ſhould even err in acquitting the priſoners, it is told to us, that it is ſafer and better to err on the ſide of mercy, than on the ſide of juſtice; it is ſafer to err in acquitting than in puniſhing. 2. Hale. 290. Weigh well, therefore, every thing you have heard; and if you ſhall find the evidence ſuch as we ſhall endeavour to ſhow it to be, uncertain, unſatisfactory, inconcluſive, let your judgments diſcard it upon this awful occaſion; for you, gentlemen, are bound to take notice of the rules of evidence, as well as of the evidence itſelf; and if you apply thoſe rules to the evidence before you, we can be under no apprehenſions for the fate of our clients.

Innocence, gentlemen, is as bold as a lion. Conſcious of their innocence, the two priſoners dread not the ſevereſt inveſtigation; but reſt with confidence that they will be reſtored to their liberty by the verdict of a conſcientious and impartial jury.

Now, gentlemen, let me conſider the effect of the evidence as it is detailed againſt Patrick Donagan. The WIEDERKOMME DROPS ſeem to be an important link in the chain. I will ſhortly obſerve upon that, as well as his intimacy and connection with Hauer, and all the other circumſtances which have been brought to your view.

I expected to have had it ſhown, from the opening, that the WIEDER-KOMME DROPS were a deadly poiſon; but no ſuch thing has been attempted, nor any account given of what they are, or how they are compoſed: on the other hand, we find both Hauer and Peter Shitz drinking of them, and that no ill conſequence ever followed from it. But it is not hard to conjecture what was the object of them; it has been the faſhion of late to deſire to grow rich by the aid of ſpirits, and theſe unknown drops were to operate as a charm or ſpell to conjure up ſome ghoſt, and to unlock the wealth that is ſecretly buried in the earth. We have had of late ſeveral inſtances of this; and deſigning and artful men, for the purpoſes of gain to themſelves, have had the addreſs to induce a ſtrong belief of this power, and to impoſe upon many credulous men. Patrick Donagan himſelf, though he does not want underſtanding, appears to have been under this influence. Why elſe would he take ſuch pains to procure drops, unleſs he ſuppoſed they poſſeſſed ſome peculiar power, and were famous for raiſing ghoſts? The very difficulty in procuring them, muſt have ſtrengthened the opinion, and the apparent reluctance to part with them for large ſums, muſt naturally have increaſed his belief, as well as his anxiety to poſſeſs ſuch a treaſure. It never could be for the purpoſe of poiſon. He would not be ſuch a fool as to offer ſuch a price as £. 50 for a gill, for the mere purpoſe of poiſoning; when for ſixpence he might have procured as much ARSENIC as would have deſtroyed half a dozen lives. Beſides, gentlemen, he would have been more apprehenſive of a diſcovery, and more cautious in his enquiries, if he had intended any harm. He never would have been ſo public in his ſearch for it, and have thus opened the door for evidence againſt him, in caſe miſchief had followed. He affects no ſecrecy, lays no injunctions upon any of the doctors. Dr. Stauſe himſelf ſeems to have no conjecture that any thing improper was intended; he even jokes upon the ſubject, and tells Patrick that he ſuppoſed he wanted to try projects with theſe drops—that Patrick ſmiled, probably at the ſhrewdneſs of the conjecture, and ſaid, yes.—Gentlemen, we never find Donagan affecting the leaſt ſecrecy in his ſearches after theſe drops. When he went to Dr. Koenigmacher he went in company with Tammany, who is proved to you to be a man of reputation. Nor is it greatly to be wondered at, gentlemen, that Patrick Donagan ſhould be impreſſed with an opinion of the power of this medicine to raiſe up ſpirits; he had heard it, probably, much talked of, and he was anxious to try the experiment.

We read of very great men who have been under the ſame deluſion, if it is a deluſion; and even Sir Mathew Hale and Dr. Johnſton firmly believed in the exiſtence of witches and witchcraft.—There may be ſomething in the temper and diſpoſition of ſome men, which may render them more peculiarly liable to ſuch impreſſions than others.—Be this as it may, it ſeems to us that this kind of evidence is too frivolous to be relied upon to affect the lives of the priſoners upon ſo ſerious a charge as the preſent. I will examine whether the other circumſtances are entitled to more weight.—

Gentlemen, is it any proof of a conſpiracy that Donagan lived in the houſe of Hauer? Muſt a man neceſſarily ſhare the guilt of the perſon in whoſe houſe he lives? or is he liable to the miſconduct of his landlord? How can he, upon any principle of reaſon, be preſumed to have a knowledge of all his plots and conſpiracies, all his wicked intentions, from the mere circumſtance of his living in his houſe, without other proof? Think how dangerous a doctrine this would be! Patrick Donagan is a ſingle man; he muſt have his home ſomewhere. But if it ſhould unfortunately turn out that his landlord has been guilty of murder, he muſt alſo ſhare the guilt of his landlord, and be liable to all the diſgraceful conſequences from the mere circumſtance of his living under the ſame roof. This is too abſurd to reaſon upon. But he has been ſeen to ride backwards and forwards with John Hauer. Is there any thing very extraordinary in this? on the other hand, is there any thing more common than that an inmate ſhould aſſociate with his landlord? will this admit of any concluſion to affect the innocence of Donagan? if it will, it will be dangerous ever to have been ſeen in company with a man, who, as it may afterwards appear, is an abandoned villain. But, gentlemen, from ſuch premiſes, no concluſion will follow.—

But the purchaſe of the powder is next reſorted to, as a circumſtance of mighty weight in the caſe of Patrick Donagan. We, on our part, can conceive nothing more frivolous and inconcluſive. It was not until two weeks after the murder that this was ever thought of at all. It is now brought in, with a view that many little circumſtances taken together, trivial and inſignificant in themſelves, ſhould appear to form a great maſs of proof. But we may eaſily perceive, that even all thoſe little circumſtances actually ſtand ſeparate and unconnected with each other, proving nothing; carrying

no conviction to the mind.—Becauſe Mr. Kapp makes bags of paper reſembling the one produced to you, though he cannot expreſsly ſwear that either the paper or the powder is the ſame which he made and ſold, you are to ſuppoſe it to be the ſame, and to preſume that no other man can fold an half ſheet of paper in the ſame ſhape. Becauſe he procures his paper all from one manufacturer; admitting it to be the ſame ſort, you are to preſume no other ſtorekeeper procures paper from the ſame man. Becauſe he purchaſes powder from Dubs and Marquedaunt, and the grains of that in the papers ſhown have a reſemblance, you are to ſuppoſe he purchaſed it of Kapp, though even Mr. Kapp admits that ſtorekeepers about Lebanon alſo purchaſe powder from Dubs and Marquedaunt. Becauſe Patrick Donagan, who was accuſtomed to quarry ſtones, purchaſed a ſmall quantity of powder two months before the murder, which he might have wanted, and have uſed for the purpoſe of a blaſt, you are to ſuppoſe this bag to be the ſame, and this powder the ſame, and that no one elſe could have purchaſed ſuch a paper of powder either of Kapp or any other ſtorekeeper. I ſay, you muſt of force raiſe all theſe hard preſumptions, or the whole argument built upon this poor circumſtance, on the part of the Commonwealth, muſt fall to the ground. For if you do not at once preſume the whole of them, then it becomes the moſt inconcluſive, uncertain and unſatisfactory proof in nature.

Of a piece with the affair of the powder, is the circumſtance of his being at the houſe of Logan, when M'Manus was there with the piſtols. What does this prove? what uſe can be made of it? If you apply it at all, the argument will prove too much. What was his conduct there? He was peaceable; he did not aſſiſt M'Manus in his oppoſition; nor did he appear to have any thing to do with him. After the oppoſition had reſted, and M'Manus was convinced that Miller was not then acting as a conſtable, they became friends again; they drank together. Miller has told us, that he had been in company with M'Manus before, at a tavern, drinking, but he thought no harm of it. But if this is evidence of a conſpiracy, or a participation in the guilt of M'Manus, why not alſo indict Miller and Logan? They are equally involved in this kind of guilt. In ſhort, gentlemen, ſuch a number of ſtrange, trifling and incoherent circumſtances never before were collected together to ſupport a charge of this magnitude, and of ſuch ſerious conſe-

quence. I am convinced you muſt diſmiſs them all from your minds, as undeſerving of that attention and weight that is endeavoured to be given to them.

It is further attempted to raiſe a ſuſpicion from the circumſtance of his going to George Illig's. Had he been at Hauer's they would have made it a plea to hang him. They would ſtill hang him though he was ten miles off on the fatal night.—This is reducing poor Patrick to a miſerable dilemma. Let him be where he would, he muſt not eſcape.—We, gentlemen, conſider this as a ſtriking circumſtance in his favour. He appears to have had no connection with the perpetrators of this murder; nor to have known any thing of the dreadful ſcene that was at that moment about to be acted. He was at a diſtance from the place; at the houſe of a reputable independent man, who is here, and has teſtified in his favour. He ſtaid there all night. It was not a trifling excuſe that carried him there. He had an account to ſettle with Mr. Illig, for quarrying ſtone; he had alſo money depoſited in his hands, to a conſiderable amount. He had often ſlept there before; he was well known, and well thought of in the neighbourhood.—In the morning he appeared as unconcerned as uſual; no marks of a diſturbed and guilty mind. He accordingly ſat down and was writing a letter to Ireland, when the meſſenger came for him. So ſudden a ſummons upon ſo awful an occaſion, would naturally ſtrike an immediate alarm; my God, ſaid Patrick, can it be poſſible?—He did not heſitate to obey the ſummons. He was not unwilling to undergo the ſtricteſt examination. He aſked Mr. Illig for a few lines to certify that he was at his houſe all night. So perſuaded was Mr. Illig of his innocence, that he went up with him to Shæfer's-town, where he was immediately diſcharged. In all this we cannot diſcover a ſingle TRAIT of guilt.——

The converſation in the gaol is the laſt circumſtance brought againſt him. Certainly what Cox declared can be no evidence againſt Donagan, for Donagan expreſsly denies his knowledge of any ſecrets, and put him to his defiance to diſcloſe it. He was indifferent to any thing he could ſay, if he only adhered to the truth. If then this could poſſibly have any operation, it can have an operation only againſt Cox himſelf. But they appear to have been haſty expreſſions, in the heat of liquor, without any meaning. We cannot,

however, conjecture what they referred to. It is more than probable, that if Cox had any knowledge of criminal matters to affect Donagan, in the heat of his rage, he would have given it vent. Be that as it may; it certainly can have no relation to the matter now before the Court. For you will observe, gentlemen, that Cox charges him with knocking souls out with axes; it could not therefore be the secret of this murder. Donagan is not charged as a principal in the murder. It is not pretended that he was present in the house of Francis Shitz, or that he was one of those who struck Francis on the head with the axe. On the contrary it is evident he was not there. Whatever this may have meant, therefore, you must dismiss the circumstance from your minds, as affecting the present case, both as to Donagan and Cox. Gentlemen, there is a strong mark of the innocence of Patrick Donagan: When he was discharged from the first examination at Shæfer's town, he still continued in the neighborhood. He was taken up a second time and discharged. He still remained, resting upon the consciousness of his innocence. It was not till three weeks after the murder that he was committed to prison. Had he been guilty, he had ample time to make his escape; and his flight would have been a strong presumption of his guilt. But he was not afraid to submit to a trial by the laws of this country; well knowing that no evidence of guilt could ever be brought to affect the good character he has hitherto supported. He is now upon that trial, waiting with awful anxiety for the verdict you shall deliver.

Let us now consider, gentlemen, whether the evidence against Cox is intitled to more weight than that against Donagan. There is not one witness who can say that he ever saw him in the neighborhood, or near the house of Francis Shitz; or that he had ever been in company with, or had any knowledge of John Hauer: they were utter strangers to each other. The whole strength of the evidence against him is founded on the conversation at Manheim. No circumstance appears from that to induce a belief that he was privy to what was passing respecting the murder of Shitz. Nothing, from any thing that appears, was disclosed to Cox at Manheim. Cox himself was deceived, and M'Manus played this trick upon him. We find from the evidence of Caffry, that M'Manus would not tell what object he had in view, only that he should receive no harm. And when Caffry asked Cox the next day, Cox declared he did not know what it was M'Manus

wanted with them. It is too ſtrong a conjecture, then, to ſuppoſe that Cox was at all acquainted with the deteſtable plan of M'Manus. There is no ground even for a probable preſumption; and in the caſe of life, it ought to be violent. We ſhall ſee by and by, whether any part of his conduct at Geiger's, demonſtrates that he knew any thing of the intention of Charles M'Manus. From the teſtimony of Caffry, it was impoſſible that Cox could have heard the converſation between Caffry and M'Manus. He was walking before, a conſiderable diſtance, with Bretz, in a loud converſation, while M'Manus and Caffry were walking behind, and talking extremely low; it was a matter between Caffry and M'Manus, with which Cox had no connection. But his going to the houſe of Geiger, on the night of the murder, is looked upon as a circumſtance of great moment. We apprehend there is the ſame uncertainty in that as in all the other circumſtances. From his conduct at the houſe nothing can be gathered which ought, with reaſonable men, to induce a conviction. The going to bed a little before 8 o'clock, proves nothing; neither is it, eſpecially after the fatigues of travelling, an unuſual hour. How can we fairly judge that Cox knew any thing of M'Manus's deſigns, from any thing that took place? On the other hand, is it not more reaſonable to ſuppoſe, from a fair conſtruction of the evidence, that he did not know any thing of it? As to his refuſal to hunt for him; that may be well accounted for from what you have heard;—he may, and actually muſt have ſuppoſed that he had gone after the girls, and that it would anſwer no purpoſe to ſearch for him. This accounts for his indifference. He had no idea that he was frozen to death, or in the leaſt danger from the cold. If, gentlemen, there had been a formed deſign, how eaſy would it have been to have ſlipped M'Manus out of the chamber window, and not let him go down ſtairs with a probability of his being diſcovered, when the deſign in ſuch caſe would have been to keep his departure from the houſe, in the night, an entire ſecret. Neither would Cox have been ſo unguarded, if he had known what M'Manus had been about, as to have let him into the houſe in the preſence and hearing of the Geigers.

Gentlemen, many parts of the evidence might be treated with deſerved ridicule, but the ſolemnity of this day, (for the neceſſity of the caſe has obliged us to break in upon the Sabbath) forbids my having recourſe to any kind of argument that would have the appearance of levity. I would not wiſh to treat you with ſo much diſreſpect.

I have endeavored to do my duty to my clients; I conceive them to be innocent of this charge. They have hitherto ſupported good characters among all who have known them ſince they came into this country; this you have from the moſt unexceptionable quarters. If the preſumptions were much ſtronger than they are, and yet liable to doubt, this good character would be entitled to have great weight;—but as the evidence in this caſe is, it is entitled to a concluſive influence.

If I have omitted any thing that might be ſaid for the priſoners, I am ſure that omiſſion will be ably ſupplied by the gentleman who is to follow me on their behalf. I am confident you cannot have much heſitation as to the verdict you ſhall give—I have no doubt, gentlemen, but when you return to this bar, you will pronounce my clients not guilty—If, gentlemen, you ſhould convict them, and it ſhould turn out hereafter, that they were innocent, you plant a thorn in your breaſts you will never be able to eradicate.

Mr. HOPKINS, for Donagan & Cox.

GENTLEMEN OF THE JURY,

Though as Counſel for Patrick Donagan and Francis Cox, we admit, that, in the inveſtigation of this cauſe, you have heard "a tale, the lighteſt word of which, (in the borrowed language of Mr. Hall, in his opening) muſt harrow up your ſouls, freeze every particle of your blood, make your knotted and combined locks to part, and each particular hair to ſtand on end, like quills upon the fretful porcupine," yet your duty is juſtice and not vengeance: though we admit, that this crime is as red as crimſon, yet it is neither in your power, nor, if it were, is it your duty to make it as white as ſnow: though we deplore, as much as any of you, the bloody and inhuman maſſacre which put a period to the innocent and unſpotted life of Francis Shitz, yet my colleagues and myſelf enter our ſolemn proteſt, before God and the world, againſt your expiating one murder by the commiſſion of another. For we hold it to be a ſelf-evident propoſition, founded in reaſon, and in a peculiar manner inforced and conſecrated by our laws, which makes it the principle of your oath of office, to try according to your evidence: that to convict theſe men of the offence with which they ſtand charged on any other ground than the evidence you have had laid before you here on oath, would, in the ſight of God and man, be nothing ſhort of judicial murder,

aggravated and blackened by the crime and ſin of wilful and corrupt perjury. In holding a language of this ſort to the preſent jury, who are, and we rejoice in the aſſurance of it, in the emphatic language of the law, ſuperior to every exception; we entertain no apprehenſions, that with them we will be liable to the imputation of treating them with diſreſpect, or of inſinuating a doubt of their diſcharging their preſent important duty with all that impartiality and cool ſolemnity which dignifies public juſtice. The cauſe of it, the emphatic, the alarming cauſe, which makes it our duty to declare it with all our powers, and your duty to hear it with your beſt attention, is the calumny which the buſy babbling tongue of lying rumour has created and given to "the bandy wind which hiſſes all it meets," to carry, not only into the ſtreets and along the highways, but into every houſe and corner, nay into the very ears of every man in the county of Dauphin. Men, feeling as they ought at the repetition of ſuch an unprovoked and horrid murder, and judging from thoſe impreſſions made by the moſt prejudiced, the moſt exaggerated, the moſt inhuman, and the moſt unfounded ſtories, have long ſince prejudged this buſineſs; and the bloody decree has by the public voice gone forth, conſigning every one whoſe name has been mentioned as any way ſuſpected, to the moſt ignominious death. The cells and dungeons in which the bodies of theſe unhappy men have been long incarcerated, have been aſſailed by it, and the continual and torturing whiſper of every gale has repeated to them this ruthleſs and ſavage ſentence.

To us, then, who are delegated by them to make known to you, who are to paſs upon their lives and deaths, their ſituation—their feelings—the grounds upon which they rely for that "good deliverance" which the humanity of the laws enjoins ſhall be ſolemnly ſupplicated for them from the Great Author of exiſtence, it is a primary duty we owe to them, which we owe to you, which we owe to ourſelves, to endeavor to diſpel this miſt of public illuſion, which repreſents every thing connected with their fate, as moſt portentous to evil.

We, therefore, call upon you, as men poſſeſſed of that native and gentle ſpirit which humanity inſpires; as men deſirous of preſerving that fair character and honeſt reputation which renders life happy; as men jealous of your country's honor and purity in the adminiſtration of its juſtice to perſons who are aliens to your conſtitution and laws, and ſtrangers deſtitute of the

ſympathy of relations and friends in this perilous hour; as men charged, in the proud and enviable character of citizens, with the inflexible integrity, and due adminiſtration of the laws of your country—as jurors, whoſe minds, the law declares, ſhould be as white paper, clear from every impreſſion but thoſe produced by the progreſs of the buſineſs in Court, and whoſe moſt ſolemn duty it is, in the language of your oaths, well and truly to try and true deliverance to make between the Commonwealth and the priſoners you have in charge, and a true verdict to give according to your evidence, to ſuppreſs every feeling which public prejudice may have excited, to diſcard every ſentiment you may have formed before you entered this temple of juſtice, and to try the priſoners, who ſtand before God and you, on their deliverance for their lives or deaths, according to your evidence. On the part of the priſoners, altho' we aſk no favours, we conceive it to be our buſineſs to remind you of what will be very grateful to your feelings in diſcharging that duty which is impoſed on you of directing and governing this "ſtrife of ſtorms," this earthquake of human paſſions, that the law enjoins, what your humanity would dictate to you, to adminiſter juſtice in mercy. Theſe men ſtand charged with counſelling, procuring and abetting the murder of Francis Shitz. The charge itſelf implies, the indictment expreſsly charges and pledges the proſecutors to prove, in order to ſupport the accuſation againſt them, that they had a perfect knowledge of the deſigns of thoſe who committed the murder; that they concurred in them, and wilfully contributed their aid and aſſiſtance in carrying them into effect. This knowledge, then, is the GIT of the preſent buſineſs—It is the eſſence of the charge. Actions in themſelves injurious, unleſs accompanied with evil intentions in the perſon committing them, induce no guilt, conſtitute no offence. The death-doing ſtrokes of the maniac, and the writhing torture inflicted by the fool, fall harmleſs at their feet. The thouſand ſhocks which fleſh is heir to, though they wring the heart, and ſuffuſe the eye of humanity, yet where they reſult from misfortune or chance, ignorance or miſtake, in the proſecution of that which is not unlawful, they draw after them no crime. If, therefore, in the diſcuſſion of this cauſe, you ſhould be of opinion, that any of the actions of either of theſe men, were either intimately or remotely implicated in this tranſaction; if you ſhould think them not ſo intended, and that their wills did not concur; or unleſs you are fully ſatisfied that they were ſo intended, and that their wills did concur, it is your bounden duty to refuſe

them any influence in this cauſe. Before I proceed to a particular inveſtigation of the teſtimony adduced in ſupport of the charge, permit me to make a few obſervations tending to ſhow what ſort of evidence (where the fact itſelf is not proved) the law requires to eſtabliſh the charge of wilful and deliberate murder. It muſt be admitted, that the teſtimony is preſumptive only. The queſtion is, what ſort of character that preſumptive evidence muſt have, which the law looks upon to be ſufficient to eſtabliſh the commiſſion of a capital crime. On behalf of the priſonere, I contend it muſt be violent, and ſuch as neceſſarily concludes to the eſtabliſhment of the fact at the ſame time that it excludes all and every other way of accounting for it. Probable preſumptions, although allowed a degree of weight in the ſcale of evidence, when applied to the inveſtigation of the civil concerns of men, is never permitted to influence the beam, even the duſt of the balance, when the great and all-important queſtion of life and death is ſuſpended in the ſcales. Every thing which is ſubject to doubt and conjecture ſinks out of ſight. Nay, every thing which is plauſible and even probable in this ſolemn enquiry, becomes lighter than air, and "leaves not a trace behind." A violent preſumption is defined to be where circumſtances are proved that do neceſſarily attend the commiſſion of the fact charged, G. L. E. 160. Loft's Ed. of Gibb. 309. 2 Bac. abr. 311. Nothing furniſhes a violent preſumption of a fact, which leaves it open to be accounted for in any other way. The crime is the ſubſtance; circumſtances which amount to proof of the commiſſion of it muſt be its ſhadow. In ſhort, gentlemen of the jury, in the language of Lord Coke, "the evidence to convict a priſoner (of a capital crime) ſhould be ſo manifeſt, that it cannot be contradicted." 3 Inſt. 137. Life being the immediate gift of God to man, to deprive him of it by human inſtitutions, requires the moſt indiſputable evidence of his having forfeited it. Relying with confidence on this principle, as the touchſtone furniſhed by reaſon as well as by law, by which conſcientious jurymen ought and will try the evidence of guilt laid before them on a charge ſo all-important to the priſoners in the bar, I aſk your indulgence while I lay before you thoſe obſervations which occur to me on the teſtimony; in which I hope to make it appear, that the teſtimony relied upon does not afford violent and manifeſt evidence of guilt; that on a fair conſtruction, it does not even furniſh any degree of probability of the priſoners being concerned; but on the contrary, loſes itſelf in doubt, conjecture and uncertainty. As the evidence againſt the two priſoners is

eſſentially different, it becomes a matter of neceſſity, to conſider their caſes ſeparately, as far as the teſtimony divides itſelf. My colleagues having firſt conſidered the caſe of Patrick Donagan, I ſhall take the liberty of firſt aſking your attention to the charge againſt Francis Cox. The evidence of his guilt is alleged to ariſe out of his conduct at Manheim—at the houſe of Geiger, and in priſon. The jury will readily perceive the difficulty the counſel for the priſoners are ſubjected to in the preſent diſcuſſion, as the gentlemen concerned for the proſecution have declined (though recommended to them by the court) to ſpeak alternately; by which the huge maſs of proof is thrown before us without arrangement, comment or application. This awkward ſituation will, I hope, in ſome degree, furniſh an apology for the want of that order and pertinency which I fear will appear ſo viſible in the obſervations it falls to me to make. I will firſt endeavor to ſhow that there is no evidence, much leſs manifeſt evidence, to prove that Cox heard and underſtood what paſſed between M'Manus and Caffry, and of courſe that he was not privy to M'Manus's deſigns; and ſecondly, ſuppoſing, tho' not admitting, that if he did hear and underſtand every word of it, though it might furniſh grounds for doubt and conjecture, yet it would not amount to the proof required by law to convict the priſoner. The circumſtances which will probably be relied on as diſcloſed at Manheim, as evincing Francis Cox's knowledge of M'Manus's propoſal and deſigns, are, that they were acquainted—that Cox firſt applied to Caffry—that he probably heard it when made to Caffry—and that Cox a day or two after aſked Caffry if he would do what they or we (the witneſs don't recollect which expreſſion) were talking about before. That Cox was acquainted with M'Manus, as men in their ſituation in life, who live in the ſame neighborhood, and particularly in ſmall villages, ſuch as Manheim is; can be no ground of ſurpriſe or apprehenſion. But its intended weight in the preſent inquiry, muſt be by way of introduction, to give a ſort of colouring to the other ſlender circumſtances urged in this cauſe, as evidencing in this poor fellow, "a heart regardleſs of ſocial duty and fatally bent upon miſchief."

We admit Cox applied to Caffry, but deny that the manner of the application or the converſation evince any bad intentions, but merely ſhow (what he has much cauſe to regret) that he was the dupe of the artful M'Manus. It was in open day, at a public ſhop on the main ſtreet, where Caffry was a

mere journeyman, without any authority, in which he tells him openly, without any diſguiſe, he had ſomething to ſay to him, and on being informed by Caffry he had no time then, but would call at his houſe: Cox, unlike a man hot on the ſcent of blood, diſcovers no impatience, betrays no diſappointment, ſhows no anxiety. This openneſs of conduct—this indifference of manner, inſtead of diſcovering a mind intent on planning miſchief, ſhows a ſoul ſuperior to, and freed from thoſe impulſes which conſtantly encircle the guilty mind. If he had the knowledge the gentlemen impute to him, and the feelings inſeparably connected with it, is it poſſible to believe that his conduct would have been thus open, thus public, when ſo eaſy an opportunity of intercourſe with Caffry, without the intervention of a human eye or ear, could be obtained?——Indeed, to every unprejudiced man, ſuch a line of conduct purſued by Cox, muſt ſhow that M'Manus never truſted him with the ſecret; or why, at the very time that M'Manus was planning the means of avoiding detection, ſhould he thus have left uncovered and totally expoſed his firſt meaſures, which it was important for him to conceal, conſidering the peculiarly delicate ſituation into which he was about to bring Cox, to be of ſervice to him in the day of trial? The fact evidently was, that Cox, totally ignorant of M'Manus's deſigns, acting from very fooliſh, but honeſt motives, having no inducement to ſecrecy, neither thought of, nor uſed any concealment or diſguiſe. Accordingly we find, if ſo plain a reſult could ſtand in need of confirmation, the ſame uniform diſregard of, and indifference to the publicity of the buſineſs by Cox; while the very reverſe in the caſe of M'Manus.—Thus, when Caffry called at Cox's in the afternoon, found him engaged with the referees about the law ſuit, enquired of him what he wanted with him, Cox at once anſwers him openly, he could not tell him till that buſineſs was ſettled. Could Cox have apprehended any harm, to reſult from what he ſpoke of thus openly, thus publicly, and in caſe it was evil, thus unguardedly? Surely not, unleſs you believe him to be a fool, or a madman. Such conduct would be like that of a man having committed murder, going into the ſtreets and highways, nay, even to the very houſe top and proclaiming it.—So little did poor Cox concern himſelf about this murdering ſcheme of which the gentlemen would have him ſo full, that this law ſuit had driven it ſo entirely out of his head, that he did not remember to mention it to Caffery that night. How different is the conduct of M'Manus, who really had evil de-

ſigns to plan and execute—when he comes to ſound Caffry and to gain his agency he embraces the unſuſpicious opportunity of their walking from the Juſtice's—ſeparates him to himſelf—makes the propoſal, and converſes on the ſubject in that low tone of voice, calculated to exclude all hearing and underſtanding of what they were talking about, by Bretz and Cox who were before. Here then you have a plain line of diſtinction between the conduct of a man who had plans and deſigns of evil to effect, and a man who had none, acting from the impulſe of the moment. The one is artful, covered and deſigning, the other is blunt, open and indifferent. Notwithſtanding the evidence for the proſecution has proved that the propoſal of M'Manus to Caffry was made to him when they were walking by themſelves, at leaſt a rod behind Bretz and Cox—that it was ſpoken in a low tone of voice, evidently deſigned to exclude Bretz and Cox from hearing—that at the time it was ſpoken Bretz and Cox were talking as loud as people uſually do in diſcourſe with each other—I ſay notwithſtanding all this, added to the other evidence which I have pointed out, of Cox not being let into the ſecret by M'Manus, will it ſtill be contended that it is probable, nay more, that it is even poſſible, that it was not only heard by Cox but ſo heard as to be underſtood by him? And ſurely the expreſſion uſed by Cox, a day or two after, to Caffry, when he aſked him if he would do what they or we were talking about before, gives no aid to the extravagant ſuppoſition of Cox having heard and underſtood what was ſaid by M'Manus. In the firſt place, the expreſſion is ſo equivocal as to leave its import a matter of doubt and conjecture, on which ground this jury is bound to refuſe it any weight againſt the life of this man. In the ſecond place taking it in its ſtrongeſt ſenſe againſt him (in which ſenſe I contend it cannot legally be taken) it only implies that he tho't he knew what they had been talking about, but in what way he got his information by over hearing them, or by M'Manus's telling him ſomething, but what that ſomething was, whether that he was going to kill the Shitz's, or, what is far more likely, that he was going to run away with ſome rich heireſs, is left utterly in the dark. In the third place we contend it related to ſome fooliſh ſtory which the art of M'Manus had impoſed on the ignorant credulity of Cox, which he ſuppoſed he had mentioned to Caffry, in which caſe the expreſſion "we were talking of before" would be exactly appropriated. But fourthly, this equivocal expreſſion and the propoſition it was brought forward to ſupport, is not left to reſt upon conſtruction, for we have the ex-

preſs declaration of the man himſelf (and all he ſaid muſt be taken together) in anſwer to the queſtion put to him by Caffry, if he knew what it was—that he did not.

The fair reſult of this examination of the teſtimony at Manheim, I ſubmit with confidence to you, is, that it is not proved that Francis Cox was privy to, or knew of the evil deſigns of M'Manus, or that he heard and underſtood what paſſed between M'Manus and Caffry; but that, as far as a fair conſtruction of their words and actions, which are the only grounds from which you can judge, go, we are warranted to ſay, he did not know his deſigns and intentions, and that he did not hear and underſtand what paſſed between M'Manus and Caffry. But ſuppoſing, though not admitting, that it was in full proof, that Cox was ſtanding by and diſtinctly heard and underſtood every thing which paſſed between M'Manus and Caffry, I would contend with great ſubmiſſion before this Court and Jury, that it does not amount to proof of any evil intention imputable to Cox, and much leſs any imputation of participating in the perpetration of that inhuman and murd'rous crime with which he ſtands charged. Here then at once to reveal the nothingneſs of this propoſition which the gentlemen conſider as all in all in the evidence they have offered; it ſtates no object; it makes known no ſcheme; it propoſes no end to be effected; a whiſper of murder is not heard in it; a hint of any ſpecific crime is not to be gathered from it; but, on the contrary, it is accompanied with an expreſs declaration, in anſwer to Caffry's enquiry, in the language of the witneſs, that "it would not hurt him at all." It is true it is accompanied with the common mummery of impoſition, a refuſal to tell till the oath of ſecrecy was impoſed and that they were then to wallow in wealth by which the artful and deſigning in all ages and all countries firſt excite the vacant curioſity, and then pervert the folly, weakneſs and credulity of mankind, to ſerve their fraudulent and many times their wicked and bloody purpoſes. Permit me to aſk any of you, if you had heard this propoſal made before this bloody tragedy was acted, if you would have diſcovered from it that ſcent for human blood, with which it is now ſaid to be ſo rank, ſince the horrid fact has happened? Surely not. In the wide field of conjecture you would in all probability have conſidered it as an attempt at ſome impoſture to acquire gain, which would be ridiculous in the eyes of every one but thoſe who were impoſing, or impoſed on, by

it:—That it was a ſcheme of wilful murder, would be the laſt ſuſpicion which would have entered the heart of any man whoſe wonted meals were not ſerved with human blood.

Remember, gentlemen, I now ſpeak of what you would have thought of this propoſition at the time it was made, when the peaceful ſecurity of Francis Shitz's houſe had not been violated; when midnight repoſe had not invited murder; when innocent blood had not been unprovokedly, inhumanly and moſt barbarouſly ſpilt: In ſhort, gentlemen, at a time when you were fully poſſeſſed of yourſelves, cool in your deliberations and unbiaſſed in your judgments. How then can you impute to this man a knowledge of M'Manus's intention to commit this crime, from a propoſition which in itſelf contains no intimation, expreſs or implied, that any ſuch crime was to be committed? To do ſo, would be to convict, not only without violent, without manifeſt proof, which the law enjoins you to require; but without any proof whatſoever. I therefore conclude on this head that if Francis Cox heard and fully underſtood what M'Manus ſaid to Caffry, (which is the utmoſt the gentlemen can contend for), that it would furniſh no rational ground to believe that Cox was privy to and knew of the deſigns of M'Manus, much leſs would it furniſh that violent preſumption, that manifeſt proof, which cannot be contradicted and which it is your bounden duty to require. Permit me now to paſs from this ground work of the charge to the firſt ſtage in the ſuperſtructure whichis attempted to be raiſed upon it, and enquire whether there is not the ſame want of proof; the ſame preſumptive evidence of Cox being the dupe of M'Manus; and the ſame doubt and conjecture hanging round the evidence taken in its greateſt latitude, againſt the priſoner. Cox went with M'Manus to Geiger's the day before the murder was committed, and ſlept there that night. This I confeſs is a main and connecting link in the chain of the evidence, and if it had been preceded by plain and manifeſt proof, which could not have been doubted or contradicted, of Cox being privy to the deſigns of M'Manus, and followed by like plain and manifeſt indications of Cox endeavoring to conceal the deſigns, and cover the conduct of M'Manus from detection, it would have furniſhed ſtrong grounds to call upon the jury for their moſt ſerious and ſolemn conſideration, to ſay whether they did not amount to that violent preſumption, that manifeſt proof, which would juſtify them in taking away his life. But diveſted of theſe eſ-

ſential ingredients it is reconcileable in Cox's total ignorance of M'Manus's deſigns, and in its ſtrongeſt application againſt the priſoner, terminates in that wide field of doubt, conjecture and uncertainty, that no humane man would conſider himſelf exempt from the imputation of cruelty, were he to deſtroy, on the ſtrength of it, the life of a ſparrow, let alone that of a fellow creature. Indeed, ſlender as it is in itſelf, it is attended with circumſtances which derogate from its weight. M'Manus had worked and was acquainted in that neighbourhood; had previouſly borrowed Geiger's ſaddle, and had the plauſible pretext of returning it, to hold out to Cox, to diſguiſe his real object, at the ſame time that he wrought on his eaſy credulity or companionable diſpoſition to accompany him. When they were there in a way ſo eaſily accounted for from the circumſtances, to hear the witneſſes detailing with ſo much emphaſis, that M'Manus got his boots drawn and left them down ſtairs—though the landlord offered ſlippers without being aſked for them; that Cox went up to bed with his ſhoes on, though the witneſs tells you on his croſs examination, that he never gives ſlippers to men with ſhoes, that they went to bed ſo early, though it was juſt eight o'clock, and the other travellers went about five minutes after, that they ſlept together—though it was expreſſly enjoined by the landlord: no diſpaſſionate man can wink ſo hard as not to ſee that they are ſpeaking from their feelings and not from that cool recollection, and unbiaſſed judgment, which ought to influence them.—

This will readily excuſe me to you for paſſing over unnoticed a great deal of that very little matter which fell from the witneſſes and coming to the few circumſtances which can be pretended to influence this cauſe. Theſe conſiſt of M'Manus's taking Cox's handkerchief and ſhoes, of Cox's conduct on the different occaſions he was applied to by Geiger—his pretending to ſearch in the language of the witneſſes, when he did get up, and his conduct when M'Manus returned. As to M'Manus having taken the handkerchief and ſhoes, there is no evidence to ſhow Cox conſented to, or ever knew of his having taken the ſhoes (and the taking of the handkerchief he told himſelf,) without which it cannot aſſume even the ſhadow of teſtimony: and if it had appeared he did conſent to his taking them, there could be no crime in it, without he alſo knew what was his intentions in taking them. So that, for you to give any weight to this circumſtance, you muſt preſume without any proof of it, that he did conſent to his taking them, and that he knew what they were

taken for, directly contrary to that presumption the law and humanity make it your sacred duty to make, in favor of the innocence of the prisoner. But we are told that his indifference on the first enquiry of Geiger respecting M'Manus, and his backwardness in getting up when repeatedly spoken to by him, with his pretending to hunt when he did get up, all show him privy to M'Manus's designs, and that he knew where he was—that while every one else was agitated and alarmed, he was calm and indifferent. I agree, that as the tree is known by its fruit, it is a fair rule where a man's actions are unequivocal, to judge of his conduct by them. On the present occasion, I utterly deny that the actions of Francis Cox, which are relied on as coinciding with the sentiments of his mind, are of that kind which authorize any unbiassed man in making the conclusion these witnesses do. In the first place, they do not speak a direct, plain and manifest language, which they ought to do to warrant an inference so highly penal; but on the contrary, taken in their strongest light, depend on such a variery of circumstances, that their result must be the subject of doubt, conjecture and uncertainty.

When Geiger first went up to see if M'Manus had returned to bed, he found Cox awake, who, on his enquiring, told him what M'Manus said was the occasion of his going out. In this, then, there was surely no ground of suspicion; but the contrary, as Cox, who, on the gentleman's principles, would have been very deeply interested in making it be believed, that he was asleep when M'Manus went out, affects no disguise, does not, in the language of the witness, pretend to be asleep, though it might have been done without suspicion, but tells him he had taken his handkerchief. After Geiger had been again sent out by his wife—had hunted without effect—he returns, goes up to Cox again, who, he says, pretended then to be asleep, wakes him, and tells him he wants him to get up and help to hunt, which Cox refuses, saying he supposed M'Manus had gone after the girls. Why should Cox now pretend to be asleep, when it could answer him no purpose, after he was awake the first time, when his pretending to be asleep and imposing that disguise on Geiger, would have been all in all to him? He had walked and rode alternately from Manheim that day—it was at least, if not past the usual hour of sleeping—a considerable interval must necessarily have been spent by Geiger in hunting, added to the want of motive to pretend sleep, fully establishes a strong probability that he was actually sleeping, and that Geiger's

ſuſpicion that he was pretending, was conjured up by his own alarmed and frightened feelings. As to his not getting up, and the ſuppoſition he made as to M'Manus's abſence, they appear to me to be the reſult of his ſituation, fatigued and ſleepy, and a firmneſs of mind, not liable to be alarmed with the ſtranger's ſtory of a young Iriſhman, full of fleſh and blood, being frozen in a neighborhood, thickly ſettled, in which he was well known. He muſt have been a ſtrange compound of weakneſs and credulity, who, not appriſed of M'Manus's deſigns, could in Cox's ſituation have been induced to comply with Geiger's requeſt. But it is alleged, that after the third hunt—after he had alarmed the neighbors, when Geiger rouſed the Jerſeymen, and was about leaving one of them to watch Cox, that he got up, went out with them and pretended to ſearch, but was not in earneſt. From the account Geiger and wife have given of their own feelings, it is apparent that every one who DID not feel and act like them, would appear to their agitated minds, to be pretending not to be in earneſt; becauſe Cox is indifferent, cool and compoſed, they conclude him criminal—becauſe he is not agitated, forward and buſtling in the ſearch, they ſuppoſe him pretending: and it is theſe apprehenſions and appearances they have been giving you for evidence, in the place of what you ought to have had laid before you, the undiſguiſed facts, and the cool, unbiaſſed obſervations made on the facts at the time. That Cox did not act that part, we readily admit; but that he acted under any diſguiſe, we deny to be a fair deduction from his conduct, taken in parts or collectively. One would have ſuppoſed, that when Cox found M'Manus out at the door, and came down and opened the door in which Geiger and wife, and the Jerſeymen were, and told them M'Manus was ſtanding outſide wanting to come in, that even the hot ſcent theſe witneſſes had, would not have been able to diſcover any evidence of guilt in it, and yet it is a made a main prop of this proſecution, that when Cox opened the door after this, that no one ſaw M'Manus, as they went ſtraight up to bed. And why did they not one and all of them ſee him? Was it Cox's fault? Or did they ſuppoſe, when Cox threw open the door, informed them M'Manus was at the outer door, and thus gave them an opportunity of meeting him, ſeeing and inſpecting him, that he was only pretending, and that he was not in earneſt? It would ſurely have been a very Iriſh way of pretending.

But I contend that the whole of Francis Cox's conduct at Geiger's, on fair conſtruction of it, ſpeaks a language directly the reverſe of that which the witneſſes and the proſecution impute to it. That inſtead of its evidencing a knowledge in Cox of M'Manus's bloody intentions, and that he was then gone to carry them into execution, it ſhows, as far as it proves any thing, that Cox was totally ignorant of M'Manus's deſigns; that he was duped by him, and that he had no apprehenſions that any evil was tranſacting. If Cox had been really an accomplice with M'Manus, his firſt object would have been to have watched the feelings, and acted up to the wiſhes of Geiger and his wife, in all his movements, as the ſureſt means of avoiding their ſuſpicion, and working out his own ſafety, at leaſt, if not that of his companion. He would have been put immediately on his guard, by the open diſcovery made by Geiger and his wife of M'Manus, when he went out, and which Cox muſt have been fully appriſed of, as the converſation which took place, was continued and loud on the part of Geiger and his wife, within hearing. He would therefore have been fully prepared to have acted his part in the ſcenes which took place between him and Geiger, by being aſleep, inſtead of being awake, when Geiger came firſt up—by feeling as Geiger felt, inſtead of ſhowing that indifference he diſcovered on being told of the alarm—by ſhowing that ready forwardneſs which Geiger's perturbation ſuggeſted, inſtead of that cold refuſal with which he met the preſſing intreaties of Geiger—by hunting with that buſtling activity and zeal, which would have gone hand in hand with Geiger, inſtead of doing it in that ſauntering careleſs way, which led Geiger to think he waspretending—that he was not in earneſt—by carefully remaining up with them in the houſe after the ſearch was given over, watching their movements, and keeping pace with their ſentiments, inſtead of croſſing them in their conjectures, ſlighting them in their anxieties—returning to bed with his wonted unconcern, leaving them to brood over their own uneaſineſs and diſtraction, to his almoſt uncertain ruin as well as that of his companion. To me it appears impoſſible to reconcile Cox's conduct in being awake—in recogniſing M'Manus going out—in telling about the handkerchief and not of the ſhoes—in being ſo indifferent—in refuſing to riſe—in being ſo at croſs purpoſes with the feelings of Geiger, to the plaineſt principles of common ſenſe, if you ſuppoſe him to be privy to the deſigns of M'Manus, whereas, in ſuppoſing him the dupe and tool of M'Manus, ignorant of his intentions, his conduct is the natural reſult of

his ſituation, his want of motives, his openneſs and his firmneſs of character, which would call for no concealment, could ſtand in need of no diſguiſe. At the time that I contend and hope I have ſhown, that Cox's conduct may much more reaſonably be referred to a want of motives and a total ignorance of the evil deſigns of M'Manus, than to his being an accomplice with him, playing the part aſſigned him in this horrid drama, yet it does not ſtrike me that the conduct on which we comment is entitled to that ſettled, marked character which can furniſh a concluſive inference either way. Sure, I am, that it is enough for us to ſhow that it is problematical in a caſe where law and reaſon join in ſaying that the evidence to convict ſhould not only be manifeſt, but ſo manifeſt that it could not be contradicted.

We have gone further, and ſhown that when weighed in ſcales equally poiſed, our inferences preponderate. The deduction then which I draw from this head of the teſtimony is, that there does not exiſt any grounds from which a violent preſumption neceſſarily implicating Francis Cox in this inhuman tragedy can be drawn, but on the contrary ſo far as the teſtimony is operative, it eſtabliſhes a ſtrong probability that he was a mere dupe, ignorantly led into his preſent critical ſituation by the artifice of M'Manus, and conſequently that it can give no ſupport to the tottering foundation formed out of the tranſaction at Manheim. As to the unmeaning ſtupid ſtory of Cox when intoxicated, abuſed and chagrined, which compoſed the third opening of the gentlemen, and which was kept in reſerve (though known to them long before) till every thing elſe was exhauſted, as it pretends to inculpate Pat. Donagan, I ſhall, to avoid repetition, defer the conſideration of it till I arrive at that period of this cauſe, when I can with propriety, conſider its force againſt both.

Permit me to ſolicit your attention to that ſyſtem of evidence laid before you againſt Pat. Donagan, which the gentleman who opened on behalf of the Commonwealth, ſtated to be ſo point blank, that it will certainly bring him to the gallows. I truſt, before I ſit down, to be able to convince you, that inſtead of it being point blank againſt the priſoner, it has in reality no point, and that even its colouring is all borrowed from that deluſion and prejudice, which has ſo generally ſettled on the public mind. To diſpel this illuſion from impartial and honeſt minds, requires nothing more than a candid diſcuſſion of the grounds of charge which ariſe out of

the evidence. These resolve themselves into six points: 1st. That Pat. Donagan was an inmate at Hauer's about a year previously to this mournful catastrophe—was often in company and intimate with him. 2dly. That he applied for the wiederkomme drops repeatedly to different persons, both in company with Hauer and alone, discovered a peculiar anxiety to get them, offering at different times, twenty, thirty, and fifty pounds for a gill; and at one time he and Hauer said they must be had, if they cost five hundred or a thousand pound, for the purpose (as the gentleman stated in his opening although there is not a particle of proof of it) of poisoning the Shitz's. 3dly. That Pat. Donagan the latter end of October or beginning of November, preceding the murder, bought half a quarter of powder of George Kapp, who thinks the bag and powder found after the murder at Shitz's, are the same he sold Donagan, though neither had any mark. 4thly. Pat. was at Logan's, in company with M'Manus, when the latter had a warrant against him, went armed to keep off the constable, and then threatened Jacob Miller who came there, if he came near, apprehending him to have the warrant. 5thly. In the language in which it was opened, that he had the precaution to leave Hauer's and sleep at a neighbour's, where he insisted on having a person to sleep with him, though he never did so before when he slept there.—6thly. What passed in prison.

To assist you in forming a just estimate of them, I shall consider them first individually, and then collectively. That Pat. Donagan should have ever had his home at the house of John Hauer, has been emphatically his misfortune; but it is neither a crime, nor any evidence of a crime. Men in low life, obliged to make their livelihood by the sweat of their brow, and forced to make their homes at places which suit their business, very seldom have much choice in fixing themselves. The business is neither profitable, accommodating, nor agreeable, to persons in respectable circumstances. This class of people are, therefore, necessitated to make-shifts, and accept of such places as offer. Sufficiently hard is the condition of such men, without wantonly imputing to them the vices and crimes of those with whom they so sparingly reside. Patrick Donagan's duty and inclination to pursue the unwearied toil of honest industry, left him little time to saunter away at Hauer's.—The business of stone quarrying, and race digging, which he pursued in different and distant parts of the country, made his ordinary returns to Hauer's

much leſs frequent than that of common inmates who uſually confine their purſuits to the neighbourhood.

Hence, opportunities for contracting intimacies and attachments, and forming confederacies, muſt have been rare indeed. Much leſs would it be in his power to diſcover the character and conduct of Hauer, and his houſehold. But, it is ſaid, that Patrick kept company, and was on terms of intimacy with him. This would be the fair reſult of prudence and diſcretion. For ſtrange and untoward indeed muſt be the conduct of that man, who would ſlight the ordinary relations of intercourſe, which ſubſiſt between an inmate and his landlord. Such civilities evidence no attachment, much leſs any confederacy. It is true, Peter Shitz mentioned that whenever he came to Hauer's, when Donagan was there, Donagan and Hauer went out and whiſpered ſomething. No man has leſs diſpoſition to remark on the conduct and evidence of this young man than I have, yet as to this part of his teſtimony, it is in all probability more the reſult of ſubſequent feelings, than of obſervation made at the time, and to any one who has heard the fiery ordeal he has paſſed through, it will not be thought ſtrange, that things in themſelves the moſt indifferent, ſhould appear to him magnified into a ſubject of well founded ſuſpicion. It would be ſtrange indeed, if men bent on his deſtruction, ſhould in this very ſuſpicious manner be concerting the means of effecting it under his very eye, when nothing could exiſt which induced ſuch a bare faced neceſſity. I for my part, cannot entertain ſo mean an opinion of the underſtanding of my client, as to believe that if he had been a perſon deſtined to act a part in this tragical drama, he would have hazarded marring the plot by ſuch undiſguiſed and ſuſpicious appearances; at all events, it is no evidence, as it is perfectly unknown what was the object of it; and you are not at liberty to conjecture about it. If you were, the probability is, from the manner in which it was done, that it related to ſomething no way connected with this buſineſs and perfectly innocent in itſelf.

The ſecond ground is conſidered as a main prop in this proſecution, and has been introduced with all that diſplay, which was neceſſary to give it its full impreſſion. I truſt, however, it will be a very eaſy matter, in the favorite language of the public proſecutor, "to knock away the blocks" on which this prop is raiſed, and lay the hollow and viſionary fabric proſtrate and

harmleſs at this unfortunate man's feet. That Patrick Donagan did apply for and ſearch after the wiederkomme drops, with an anxiety and zeal, bordering on enthuſiaſm, and with a credulity commenſurate with its myſterious virtue, was acknowledged by him on his firſt examination, and would never be denied by him in any ſituation; but that he entertained evil deſigns in ſo doing, or harbored a thought of injury or prejudice to any one by it, we utterly deny. On this we take iſſue and call on the gentlemen for their proofs. The affirmative lies with them, and it is their bounden duty to prove it. Nothing can be taken for granted if the inquiry involved in it the value of a cent only; much leſs can it be when the life of this man is ſtaked on the iſſue. I then call upon the gentlemen to ſhow, to point out to you, to lay their finger on that part of the evidence which proves that this man had bad intentions; that the object for which he was getting theſe drops was evil. To prove to you that the evidence does not contain any ſuch proof, and that, on a fair conſtruction, it carries with it a contrary preſumption, permit me to conſider it as ſtated to you by Doctors Stauſe, Orndorf and Kœnigmaker. As the facts related are freſh upon your minds, I ſhall not trouble you with repeating them, but refer myſelf entirely to you for the pertinency and propriety of my obſervations upon them.—By a recurrence to theſe gentlemen's teſtimony you will find the grounds of accuſation reſolve themſelves into the following particulars. That Hauer was concerned; that they were ſought after by Donagan with great anxiety; that he actually offered fifty pounds for a gill, and declared they muſt be had if they coſt a thouſand pounds; that he was hurt and very angry at Orndorf's not getting them; that when aſked if they were going to try projects with them, he ſaid, yes; that they were the colour of laudanum; that they had got them before, but they were not ſtrong enough. I ſhall conſider their weight, and point out the concurrent circumſtances which diſprove and deſtroy their application.

Hauer was concerned, and certainly the projector of the necromancy, which in all probability was deſigned to hang Donagan inſtead of hurting Shitz, by which he expected to ſweep the hard earned money of Donagan into his own pocket. In the wide field of conjecture which this buſineſs opens, Hauer's character and conduct ſeem to lead to the above concluſion. But be that as it may, there is nothing diſcloſed by the conduct of either,

which points out poiſoning as the object of theſe drops. Judging from the eſſay made with them, they were mere jugglery which was to prepare the way for the ſubſtantial part of the buſineſs, the hanging. That any thing could be effected by them upon Peter Shitz was totally out of the queſtion, as he had already experienced the effects of the ſcheme; and had removed to his brother's more than a year before. But with the gentlemen, to be acquainted with Hauer, is cauſe of ſuſpicion; and to be concerned in any of his intrigues, though the object of them is utterly unknown, and the probability is that you are duped into and likely to be the victim of it, is cauſe of condemnation. To me it appears that the fair concluſion from Donagan's anxiety to have the drops, and his folly to purchaſe them at any rate, ſhows clearly that he had no evil intentions to effect by them. The application at Lebanon, a conſiderable town much frequented, at a ſhop in the habit of doing buſineſs, was in open day, in the moſt uſual and public manner, to a gentleman of character, without any reſerve or injunction, accompanied with the moſt undiſguiſed converſation on the ſubject. He ſpeaks of the reſerve of phyſicians—tells him he need not be afraid of their doing any harm—mentions the places where, and one of the gentlemen of whom, they had been got—propoſes getting from Doctor Luther the Latin or Engliſh name of them to enable Mr. Strauſe to procure them—the ſame anxiety to get them is accompanied with the ſame openneſs, the ſame unreſerve in the application and intercourſe with Doctor Orndorf—he tells him, Doctor Fahnſtock had them, of his applying to him and the Doctor's laughing at him—urges and tempts him to apply to Mr. Fahnſtock, to Doctor Keller for them—tells him they had been got of Luther, but were not ſtrong enough. And even at the election at Shæfer's town, in a tavern, in a room full of company, does he tell Hauer of his failing in ſucceſs, on which it is openly mentioned, in the preſence of Orndorf, that they would have them if they coſt a thouſand pound. At Doctor Kœnigmacher's the ſame publicity is manifeſted. Donagan takes with him when he makes the application, a man of confeſſedly good character, and enjoins no ſecrecy. Apprehenſive that his failure heretofore in getting the drops, might have ariſen from ſome poſſible bad application which they might be liable to, and which the Doctors might have apprehended, and apprized that he was thus laying the train by which the mine would inevitably be ſprung upon him if he had evil in view, we find him coming forward and offering ſecurity to the amount of one thouſand or

ten thouſand dollars not to hurt any one with them. To make the firſt ſtep towards murder by poiſon, in the face of circumſtances ſo unauſpicious to ſucceſs, and ſo ominous of detection, evinces ſuch groſs folly and ſtupidity, that nothing ſhort of poſitive proof can entitle it to belief with any reaſonable man. It would ſurely be committing murder for the ſake of being hanged. But it is ſaid he was ſenſibly alive to the diſappointment at Orndorf's, and was angry with him. The more fooliſh a man's projects are, the more ſenſibly he feels a failure in effectuating them. His diſpleaſure at Orndorf was however a tribute due to the principles of moral rectitude. Orndorf had promiſed him, not only once or twice, but many times, to go in a limited time to Dr. Fahnſtock's, and had uniformly broke his promiſe and diſappointed him. If Patrick had been dead in feeling to this repeated diſregard for truth, it would have argued much more ſtrongly than his irritability at it, his capability to commit the deed they impute to him. Had it not been particulariſed in the opening for the proſecution, that Donagan's anſwering yes, to the queſtion put to him by Doctor Stauſe, that he ſuppoſed they were going to try projects with the drops, was nearly tantamount to a confeſſion of the views they impute to him, I ſhould have been at a loſs to diſcover in an anſwer ſo evidently ſuggeſted by the tranſaction itſelf any criminality. To have denied that he had projects to be effected by drops, for which he was willing to give any price, would have evidenced a lying ſpirit and bad motives. The anſwer was true, and given with that readineſs and complacency which ſhowed him neither influenced by apprehenſion nor dread. On the Doctor's aſking him the colour of the drops, we find Hauer pointing to ſome liquid of a browniſh colour, from which the gentlemen infer, though the Doctor did not intimate any thing like it, that it was laudanum they were after, which unduly taken will poiſon, and having got thus far, they eke it out with another conjecture, that Donagan intended to poiſon, and having the ſtuff and intention thus manufactured, there is nothing wanting but the perſons to be poiſoned; they therefore add the Shitzes, which produces the propoſition to be demonſtrated, that Donagan was in ſearch of laudanum to poiſon the Shitzes. In this way allowing one inference to produce another, with the aid of a few conjectures to ſupply vacancies, the moſt upright man or ſet of men in the community may be ſtrung up. Far be it from me to think any of the gentlemen concerned for the proſecution capable of wiſhing to influence it to this extent; every perſon who

knows them is convinced that it is impoſſible; but the zeal of duty, the ſenſibility of feeling and the diffuſive latitude of the evidence on which they are to be employed on the preſent occaſion, call upon them to guard againſt thoſe extremes of which the opening certainly partook, not intentionally I am ſure, but from incorrect ſtatements which had been made by the witneſſes, of what would be the teſtimony. The only ground which remains to be conſidered, that has been advanced as ſupporting the conjecture, that Donagan was in ſearch of drops to poiſon the Shitzes, is, that it was mentioned both to Doctor Stauſe and Doctor Orndorf, when he ſpoke of the drops got of Doctor Luther, that he ſaid, they were not the real ſtuff, they were not ſtrong enough; whence they make the deduction, that if they had been ſtrong enough, they would have poiſoned and had been uſed to poiſon. This is begging the queſtion. They take for granted what we utterly deny, and what the whole ſtory diſproves, that the quality of the drops applied for to Doctor Luther were poiſonous. Here they ſhould begin and eſtabliſh their premiſes, before they attempt to draw their concluſion. There is no crime which the gentlemen could not eſtabliſh againſt the moſt innocent man on earth, by this ſort of logic. If the drops applied for to Doctor Luther had been deſigned for murder, is it poſſible to believe that they would thus openly and unneceſſarily be brought forward as the ſubject of converſation to all perſons and on every occaſion? Surely not. Indeed, from every account we have of thoſe drops, they appear to have no qualities but what are extremely innocent Patrick had been perſuaded to believe they were calculated to exhilarate and enliven the ſpirits, and from actual experience of their effects on Peter Shitz, we are warranted in concluding they poſſeſſed no noxious quality. It is apparent, Hauer uſed them to catch the idle curioſity and to fix the wavering credulity of thoſe he attempted to practice upon in a more ſubſtantial way, without expecting from them any other reſult.

I have thus conſidered the weight of thoſe grounds which have been opened as proving that Patrick Donagan ſought after the wiederkomme drops for the purpoſe of poiſoning the Shitz's, and truſt, that conſidered individually, ſo far are they from proving it, that they actually diſprove it, and ſhow that he had no ſuch deſigns. I would ſolicit a moment's attention from you, to their collective ſtrength; for I admit, that a number of circumſtances taken

together, may prove a fact which conſidered ſeparately, they would not eſtabliſh. The gentlemen's concluſion from the teſtimony of Doctor Stauſe, Orndorf, and Kœnigmaker is, that Pat. Donagan wanted to procure the wiederkomme drops to poiſon the Shitz's. Our firſt anſwer is, that it is no where proved that theſe drops were poiſonous, and you are interdicted by your oaths from preſuming it. In the ſecond place, we ſhow you that Donagan's conduct throughout evinces he had no ſuch intention, becauſe it was uniformly open, public and undiſguiſed, and marked with thoſe palpable and indelible traces, which would have rendered detection inevitable, in caſe ſuch intentions had gone into effect. Thirdly, if poiſoning had been intended, it would have been effected without expence, without expoſure, and without a probability of detection. Doctor Stauſe tells you, an ounce of arſenic, which he would have ſold to any one for ſix pence, without notice or enquiry, would have ſwept the whole family of the Shitz's from the face of the earth. To men, whoſe object the gentlemen ſay was murder, money and concealment; I leave you to judge, which of theſe means of effecting them by poiſon would have been preferable. And fourthly, we ſhow you that in the ignorance, the folly, the credulity, the intereſt, and the practices of men, this conduct of Donagan's is more eaſily and rationally accounted for, than by ſuppoſing its object to be blood. We contend that the whole tranſaction evidently ſpeaks it to be one of thoſe many impoſtures which we ſee daily practiſed by perſons wiſhing to acquire gain from a pretended knowledge of the occult ſciences; and that Pat. Donagan's mind was ſo powerfully influenced by it, as to induce him to become a perfect dupe to it. That the principles of this deluſion are ſtrongly implanted in human nature, no man of information or obſervation can deny.

In all ages and in all countries (notwithſtanding, they have had line upon line and precept upon precept againſt it,) it has continued to be practiſed. When it comes forward under the ſeducive appearances of innocence, of intention and injury to no one, to offer to man on the eaſy terms of belief, ſecrecy, and concurrence, wealth—unbounded wealth—the object of his reſtleſs days and anxious nights, it ſpeaks a language to the eaſy credulity of the laborious and uninformed claſs of mankind, which they find it difficult to reſiſt, and which they never repel with indignation. And even amongſt us, "the moſt enlightened people upon earth, broad is the way that leads

into this fairy field of incantation; many (very many) are they that enter in thereat." The human mind once unbalanced, comet like

—"runs lawleſs through the void"

"Deſtroying others, by itſelf deſtroyed."

The young and the old, the induſtrious and the lazy, the gay, the ſerious, the religious and the auſtere, are frequently found paraded on the ſame circle performing with all the zeal of ſincerity and the officiouſneſs of anxiety, that ritual of abſurdity which is to diſſolve the enchantment, and ſurrender up to its votaries the treaſures which are to reward them. Laſt week, in York, there was diſcloſed an illuſtrious ſacrifice, made by upwards of one hundred perſons, reputably ſettled and connected there, of all tongues and languages, of their underſtanding, and even of their common ſenſe, to this demon of ſeduction in a project, the proceſs of which was much more abſurd and expenſive than the preſent, but the object of which was the ſame. And if I miſtake not, numbers of the good people of this reſpectable county of Dauphin, at a period not very diſtant were the dupes of a like ſpecies of deluſion.—Charity, then, which is the mantle of religion, and the faireſt ornament of our nature, muſt be a total ſtranger to the breaſt of that man, who could impute murderous motives to this unfortunate priſoner, from a piece of conduct which reſolves itſelf on the plaineſt principles of common ſenſe and its own internal evidence, into one of thoſe ordinary but deluſive occurrences which ſo often excite the curioſity of mankind. Indeed, the native and gentle ſpirit of humanity is ſo infuſed and predominant in the rules of law which preſume innocence, and exclude from weight in capital caſes, all conduct which can be reaſonably accounted for in any other way that your duty concurs with. What muſt be the inclination of every humane mind, to refer this piece of conduct and its reſult to that mode of accounting for it, which ſtands with mercy? The third ground of charge reſpects the powder purchaſed of Mr. Kapp. To treat this head in the manner it deſerves, would ill become this ſacred day, and the preſent ſolemn occaſion. My obſervations, therefore, will be confined to ſhow how very inconcluſive and deſtitute of any rational applications it is. The ſimple fact is, that about the beginning of November, Donagan bought half a quarter of powder at Kapp's ſtore; in the ordinary run of buſineſs, without being accompanied with any circumſtance to make or fix attention. It is true you were told in the opening, that Patrick was fixed on to get the

powder for the buſineſs—that he aſked for the beſt kind—and got it folded up in a particular way, like that of the bag found; but as not a particle of proof has been given of either of theſe particulars, you are bound to diſcard them: and I am ſure, the gentleman's candor who introduced them to your notice, will join in this requeſt. In this fact then there is no indication of guilt. The ſpace which lies between it and murder is truly immeaſurable. But to give it application, be pleaſed to attend to what the gentlemen wiſh you to do. What is it? Why, that you ſhould preſume Patrick Donagan bought the powder to ſhoot Francis Shitz; that it was the identical powder that deſtroyed him. And on what grounds are you aſked to take this daring, this inhuman flight, when you have the life of a fellow creature in charge? None, I am confident to ſay. As to the idle account given by the witneſs, of the likeneſs between his bags and the one found at Shitz's, after it was conſiderably rumpled and dirtied before he ſaw it—tho' he reluctantly admits he could not diſtinguiſh between his own bags—or between bags made of the ſame paper by other people in the uſual way—that numberleſs other ſtore keepers might have like paper—as he did not get it all—and of the likeneſs between his powder and the powder found—though he admits he did not buy all there was of the ſame quality—that others in the neighbourhood deal with the ſame perſon alſo—that he does not keep any account or take any particular notice of thoſe he ſells powder to; they cannot riſe to the dignity of being noticed on this ſerious hearing. It is the mere opinion of the witneſs, formed from premiſes ſo equivocal and open to objection, that every man of experience muſt ſee that the opinion itſelf is raſh and thoughtleſs in the extreme. So remote and improbable was this connection that it did not occur to the witneſs or agents of the proſecution for a length of time after the murder, though Donagan was apprehended and examined in their preſence the next day in the very place. The gentlemen's fourth ground of charge is founded on what paſſed at Mr. Logan's, as related by Jacob Miller. I confeſs myſelf perfectly at loſs to know where to begin to give a ſerous anſwer to this part of the accuſation. The only fact upon which it is reſted, is that he was there at the ſame time M'Manus was, who went armed to guard himſelf againſt the conſtable. It cannot be pretended that they were there on any formed deſigns, as there is no proof of any ſuch thing, and it is expreſsly proved, that Logan and wife were in company with them. It cannot be pretended that Donagan

took any part in the improper conduct of M'Manus, or countenanced him in it, as their own witneſs proves expreſsly that he did not. Indeed, ſo entirely harmleſs and unlike a prelude to murder was the ſcene, that even their witneſs tells you he joined them, and ſpent at leaſt half an hour in their company drinking with them. If merely happening to be in company with M'Manus, furniſhes any evidence againſt Donagan's life, I ſuſpect the next proſecution for aiding to commit murder that will be heard of in the County of Dauphin, will be againſt Logan and his wife, not only for being in company with M'Manus, but allowing him to be at their houſe—and againſt Jacob Miller for intermixing and drinking out of the ſame glaſs with a man who intended to commit murder. How tottering muſt the ſuperſtructure be which ſtands in need of ſuch arguments as theſe to ſupport it. As the cauſes of objection multiply they increaſe in ingenuity and curioſity, of this we have a very ſignal diſplay in the fifth head of accuſation. Donagan, the opening ſays, the night of the murder had the precaution to ſleep at Mr. Illig's. The whole guilt of this propoſition ariſes from the language in which the gentlemen have expreſſed the fact, and not from the fact itſelf which pointedly impugns it. He ſays, had the precaution which implies contrivance and deſign, and imports as uſed here, that Donagan went there to avoid ſuſpicion and to conceal his being concerned. The fact as related by Mr. Illig, is, that he came there to ſettle with him, ſtaid all night, and when they were about beginning in the morning, the conſtable came and took him. That Pat. expreſſed ſurprize at the murder, but neither changed countenance nor expreſſed any backwardneſs to go. Does all or any of theſe circumſtances ſhow precaution, or furniſh any evidence of it? If ſuch conduct ſhows precaution, I would be glad the gentlemen would point out that behavior on ſuch an occaſion, as they would account indifferent. At one moment the gentlemen make him the author of the plot, "riding in the whirlwind and directing the ſtorm;" at another, when the moment of execution approaches, they aſſign to him the timidity of the hare, ſeeking ſhelter from the tempeſt he had created. Is it not on the contrary, the conduct of a man conſcious of no crime? To help out this forced conſtruction given to conduct in itſelf ſo indifferent, the opening ſtated, that Donagan was very anxious, and inſiſted to have ſome perſon to ſleep with him that night: but when we come to hear the evidence, this allegation is not only not proved, but expreſsly diſproved. Obſerve then the dilemma to which the priſoner is

reduced by this mode of reaſoning. He is to be hung for going to Mr. Illig's that night, becauſe, the proſecution ſays, it ſhows precaution, which evinces knowledge of the plot; and if he had been ſo unfortunate as to have ſtaid at Hauer's, the gentlemen would then have made that demonſtration plain of his guilt. So that going or ſtaying, his fate was inevitable. Death was his doom. This mode of arguing reſembles the bed of the bloody and inhuman Procruſtes; if the victim was too long, he lopt him off—if too ſhort, he extended the ſhivering members till they fitted. The ſixth and laſt head which the proſecution has endeavored to reſt upon, relates to what paſſed in jail, when the priſoners were intoxicated, as related by Mr. Rahm. It is not incumbent on me to extenuate, or in any way excuſe the impropriety of this conduct;—It is apparent. But perhaps to a mind ſenſibly alive to the failings of human nature, an apology in ſome degree extenuating, might be found in the uninterrupted ſeverity of a long and tedious confinement. Be that as it may, it cannot influence the queſtion now trying. As to Donagan, it is not entitled to be conſidered as evidence againſt him; as declarations of one man not on oath cannot affect another, unleſs his conduct in the intercourſe countenances and introduces it. Tried by this principle of law and reaſon, how do Cox's denunciations affect Donagan? Not in the leaſt poſſible degree, becauſe they are not only repelled with contempt and indignation, as the empty threats and lying ſuggeſtions of a mind ſtung and goaded to madneſs by abuſe, inſult and degradation; but he ſolicits, challenges, nay even defies him to tell every thing he knew of him that was conſiſtent with the truth. If Cox had known any thing prejudicial to Donagan, is it poſſible to believe that this treatmeat of him, in the ſituation in which he was, would not have given vent to it? If Donagan had not been conſcious that Cox could not ſay any thing of him which would be prejudicial, can it be believed that he would thus have acted with the boldneſs of the lion at a time when the fawning of the ſpaniel would have been his only chance of ſafety? The gentlemen's maxim is, that when liquor is in, wit is out, which applied to Cox, ſhows he had nothing to diſcloſe, otherwiſe his ſituation would have given it full vent, and the ſecret would have been out.

In addition to theſe ſtrong marks of Cox's declarations being the effect of rage, diſappointment and degradation, which is no uncommon weapon of vulgar minds, when overcome in point of ſtrength, we find when the time

arrived that they were to go into effect, by being diſcloſed to the Judge, and Patrick ſtill continued oppoſed to a reconciliation, unleſs Cox would tell what he knew of him, that Cox declares he had wronged him. This evidently was the truth; for we find, when Cox was called on by one of the gentlemen concerned for the proſecution, to enquire if he would confeſs, which call alone, unſolicited and unaſked for by the priſoner, pledged the Commonwealth to inſure his impunity againſt any thing he diſcloſed, he declared in the moſt ſolemn manner before his God, that he knew nothing to reveal. Is it poſſible to believe, if Cox had been the man this proſecution repreſents him to be, that when tempted by every thing human that his ſoul could wiſh—impunity againſt his crimes, and liberty from his cloſe and hard confinement, at the moment when this trying hour was rapidly approaching, that he would not have made full diſcovery as the means of his ſafety? Surely not, if you judge him by the ordinary principles of human action. But permit me to aſk you what thoſe ſecrets were, which this intoxicated man ſaid he would diſcover? It no where appears in the evidence—the ingenuity of the gentlemen has not found a name for them—"ſhadows, clouds and darkneſs reſt upon them." Whether if they actually exiſted (which I utterly deny from the complexion of the evidence) they related to this buſineſs or to any other matter, is altogether unknown: And when the queſtion is, whether theſe men are "to be or not to be," I am ſure your inclinations will concur with your duty in refuſing to plunge into this unfathomable abyſs to deſtroy them.

In this inveſtigation I have endeavored to familliarize you to the principles of evidence which enter into this diſcuſſion, by explaining them and pointing out their application to the different parts of the evidence and their operations upon it: but as the principles of every ſcience as well as thoſe of the law, muſt in their nature be conſiderably abſtracted and theoretical, and of courſe not ſo impreſſive on the minds of men unaccuſtomed to the habitual uſe of them, as the caſes which gave riſe to them, I muſt ſolicit your attention while I ſhow to you the practical application of them from a few adjudged caſes.

The preſervation of life being the firſt object of nature and of ſociety, our laws have manifeſted the moſt ſacred regard for it. It has therefore become

the ſettled doctrine of our courts, in capital caſes, that all preſumptive evidence ſhould be admitted cautiouſly: for the law holds it is better that ten guilty perſons ſhould eſcape, than that one innocent man ſhould ſuffer; 4 Bla. 358. In the caſes I am about to read to you, the grounds of this principle will be developed, and the moſt ſolicitous regard diſcovered for it. In the caſe of the King againſt Sprigg and Oakley, who were indicted for piracy in ſinking a ſhip near the Iſle of Man. The evidence was——[Mr. Hopkins then read the caſe of Sprigg and Oakley, as the ſame is cited *ante* p. 89.]

Here the jury ſee a hoſt of circumſtances all concentrating in the ſame point—the guilt of the priſoners ruſhing on the mind, and calling aloud for their conviction: yet, as their collective weight rendered the fact charged extremely probable only; but did not neceſſarily induce the commiſſion of the fact by them (as the ſhip might be ſprung or broken in her bottom) they were acquitted.

In the caſe of the King againſt Maſon, who was indicted for maliciouſly and piratically burning a ſhip, to the great damage and defrauding both the owners and inſurers, againſt the form of the ſtatute: The facts appeared on the trial to be as follows: "The ſhip was laden with linen at Rotterdam "and bound to Malaga, in Spain. The defendant when he received the bill "of lading was ordered by the merchants and owners to put in at "Lynn Regis, in Norfolk, in order to get a Mediterranean paſs for his ſafe-"ty. It was proved by one witneſs, who was the carpenter of the ſhip, "that the defendant when he came near to Dartmouth-bay, tampered with "him to know what he would take to knock the ſhip on the head. "It was proved by another witneſs, that the defendant gave the ſhip's crew "ſome bowls of punch on the day the ſhip was burnt, and made them all "drunk; and afterwards ordered the witneſs to make a fire in the cabin, "where there was none for a month before that time; which he did when "the defendant and moſt of the crew were going on ſhore, except two who "were very drunk; and that there was but one bucket belonging to the ſhip, "which the defendant had ordered a ſailor to fling overboard the day before "the ſhip was burnt. The two ſailors who remained drunk in the ſhip, "made oath, that they were ſleeping there until the ſhip was ſo much on "fire that they could not relieve her, nor themſelves, but that they were

" carried off by another ſhip's boat then in the harbor. Upon this evidence, " the preſumption was very ſtrong that the ſhip was burnt by that fire which " was firſt made in the cabin; but this being only preſumption, and no " direct proof, the defendant was acquitted."

The preſſure of theſe circumſtances againſt the priſoner, ſo encircle him with guilt, that one would be induced to think, that even a ray of hope could ſcarcely pierce the almoſt impenetrable darkneſs: yet, as it was poſſible (though moſt improbable) that ſhe might have been unintentionally and unknowingly fired by the two ſailors in their drunken reveries, or by other means ſtill more improbable, the priſoner in favor of life was found not guilty.

Lord Chief Juſtice Hale, whoſe memory will be revered as long as law, learning or religion remain upon earth, has recorded the following inſtances of the deceptive and dangerous influence of preſumptive teſtimony, for the inſtruction and warning of poſterity.:

" In ſome caſes preſumptive evidences go far to prove a perſon guilty " though there be no expreſs proof of the fact to be committed by him, but " then it muſt be very warily preſſed; for it is better five guilty perſons " ſhould eſcape unpuniſhed, than one innocent perſon ſhould die."—[Mr. Hopkins then read the caſe from Hale, 289—90, as the ſame is cited *ante* pa. 87.]

Here you ſee how deceitful ſuch teſtimony is, when ſpeaking its ſtrongeſt language—The actual theft—B. found in poſſeſſion of the horſe—in the act of taking him away—and unable to give any account of the manner in which he came into his poſſeſſion, all irreſiſtably concurred in pointing him out as the thief: and yet, alas! for the infirmities of human nature, the whole was a deluſion; and the innocent blood of B. was ſpilt in the very ſanctuary of juſtice.

Another caſe recogniſed by him is the following.——[Mr. Hopkins then read the caſe of the Uncle and Niece, as cited *ante* pa. 87—8.]

The child's entreaty, "Good uncle do not kill me," ſuppoſed to be "prophetic of her end;" the uncle's artifice, the effect of hurried thought and agitating fear—and the manifeſt detection of that impoſture, led the jury to ſacrifice the uncle to enſure the peace of the community, and to avenge the inſulted juſtice of its laws. Lo! and behold! the child grown to womanhood, while her uncle was rotting in his grave for having murdered her, appears. I call upon you to contraſt theſe caſes with the preſent cauſe, and to mark how they blaſt the ſuppoſed operation of thoſe inconcluſive circumſtances—thoſe conjectured confederacies—thoſe alleged embryo-plots—thoſe indifferent actions—which have been raked together to form the ground work of this proſecution. I ſubmit to you with great confidence, that the gentlemen's point blank proof againſt Donagan, is perfectly blank without any point—and that the teſtimony which was ſtated to be ſo convincing and demonſtrative of Cox's guilt, is not entitled to be conſidered as even influencing the beam. Every thing that is doubtful—every thing that is conjectural: nay, more, every thing that is probable, and even highly ſo, muſt ſicken and die under their influence: Nothing ſhort of that which is ſo manifeſt that it cannot be contradicted, can weigh on the deciſion of ſo momentous a queſtion.

Having gone through the teſtimony which has been laid before you on behalf of the proſecution, and endeavored to meaſure it by the rules of evidence, and to weigh it in the ſcales of reaſon, as it relates to both the priſoners, I find myſelf impelled to congratulate the humane feelings of every perſon who hears me, that it is not only found wanting, but greatly wanting—to eſtabliſh either of the charges.

But although the priſoners might with great ſafety rely on the groundleſſneſs of the proſecution for their deliverance; yet, impreſſed with a due ſenſe of duty to themſelves and a reſpectful deference for you, they have furniſhed, and we have laid before you (the only additional evidence which the nature of the caſe admits of on their behalf) the moſt reſpectable teſtimony of both the priſoners having, before this calumny was created, extenſively and uniformly ſupported the character of quiet, induſtrious, ſober and honeſt men.

This is the innocent man's coat of mail on the day of trial. Though in the viciſſitudes of human affairs, it is not for him to prevent the arrows of affliction being pointed againſt him; yet, rare muſt be the inſtance, if it ever occurs, in which it does not protect and ſave him from their mortal aim. To the whiſpers of ſuſpicion and the clamors of prejudice theſe men oppoſe —their laborious induſtry and honeſt reputation.

What more could you as reaſonable men expect of them? One very important circumſtance in favour of Donagan remains to be noticed. Though early appriſed of the ſuſpicions againſt him, we find he never offered to elude them by eſcape, notwithſtanding his unreſtrained liberty for a number of weeks gave him the moſt ample opportunity of effecting it. Is this the conduct of a man immerſed in human blood on whom the eagle eyes of the moſt jealous ſuſpicion were bent?

"As well might the rapacious tiger
"Perſuade the hunted deer to harbour in his den"

As for a man whoſe ſoul was ſo polluted as the gentlemen would have Donagan's to be, to perſuade himſelf to ſtand his ground on ſuch an occaſion and with ſuch opportunities of fleeing, it muſt be repugnant to every feeling of human nature.. Having experienced from this honorable Court, and the gentlemen of the jury, every attention and indulgence which could contribute to a fair and impartial diſcuſſion, on behalf of theſe unhappy men as well as for myſelf, I feel myſelf bound to tender them my humble and moſt grateful thanks. Conſcious that this jury will remember with accuracy—will examine and compare with caution—will reaſon and deliberate with impartiality and candor—and will decide with that ſolemnity which exalts public juſtice, on the teſtimony alone, I ſubmit with great cheerfulneſs to them the fate of theſe unfortunate men, under a full conviction, that upon the evidence and the law they muſt be found not guilty.

Meſſrs. CHARLES HALL, CHARLES SMITH, and MATTHEW HENRY, Counſel for the Commonwealth.

GENTLEMEN OF THE JURY,

However painful may be the taſk which we are now to perform, yet it is a duty we are bound not to ſhrink from. There is juſtice due to the commonwealth as well as to the priſoners; if they are guilty they deſerve to be

punished; and it will be required at our hands, that we ſhould endeavour by a full and correct, yet candid ſtatement of the facts, and juſt argument ariſing out of ſuch facts, that they may not eſcape upon miſtaken principles of humanity or compaſſion. We are not bound to go further, or to embark our paſſions in a caſe of this nature. And although it has not been frequent in capital caſes to call in the aid of additional counſel on the part of the ſtate; yet when the complicated nature of this caſe was conſidered, the probable length of a number of trials, and the many able and ingenious counſel employed for the different priſoners, the duty, falling alone upon the public proſecutor, would have been laborious in the extreme. It was, therefore, in this remarkable caſe thought prudent to engage other counſel, not for the purpoſe of oppreſſion, but to aſſiſt in the fair inveſtigation of the facts.

The priſoners at the bar have been very ably defended. Every thing that could poſſibly be done or ſaid for them, has been done and ſaid by their counſel. And if the reſult of this important trial ſhould be unfortunate to them, it will not be becauſe the greateſt exertions have not been uſed on their behalf; for they have diſcharged their duty faithfully towards them.

It becomes us, then, with as much clearneſs as we are able, to conſider the arguments you have heard on their behalf, and to oppoſe to them ſuch reaſoning upon the facts as we ſhall judge proper. You will give ſuch weight to the arguments on either ſide as you ſhall coolly and deliberatelythink they deſerve. If the reaſons for an acquittal are ſtronger than thoſe for a conviction, you will of courſe acquit. Having done our duty faithfully, but preſſing nothing unduly, we ſhall leave the fate of the priſoners with you, well ſatisfied, that you will decide as your conſciences ſhall direct you.

We, on our parts, do indeed believe, that, when the whole evidence is conſidered, and deliberately weighed by you, there can be little doubt but the reſult muſt be unfavourable to the priſoners. If we did not believe this, upon rational grounds, it would be unpardonable in us to preſs for a conviction, which will affect the lives of theſe men. But we are to convince your underſtandings, not to inflame your paſſions.

Gentlemen, there are three priſoners before you, whether they are to live or to die, depends upon your verdict. We are to conſider how the evidence applies to each of them. With reſpect to John Hauer it would have been neceſſary to have ſaid but little, if we did not conceive that the circumſtances relative to him, furniſh the ſtrongeſt evidence to account for the conduct of the other priſoners at the bar. It is with an eye to them that we find ourſelves conſtrained to detail, ſomewhat minutely the wicked conduct of John Hauer; not that we think it neceſſary to induce his conviction. He ſtands before you undefended, ſelf-condemned; a melancholy inſtance of the depravity of man!

We mean to ſhow, gentlemen, a deliberate, long premeditated plan on the part of John Hauer to deſtroy the lives of the two brothers of his own wife. That he made a variety of efforts to accompliſh his dreadful purpoſe, alone, unaſſiſted; with every poſſible degree of art to prevent a diſcovery. All theſe efforts failed. The ſignal eſcapes which they made, ſtrongly marked by the finger of Providence, ſeemed to make no impreſſion upon his callous heart. He was determined to perſevere in his ſcheme of blood, until the innocent victims of his vengeance ſhould be laid in the duſt. With this iniquitous view, we find him combining with the worſt of men; men who would not ſhrink from murder; fit for ſtratagems and aſſaſſinations, and who from their hardened minds, were competent to aſſiſt him in the dire plan he had conceived.

Gentlemen, it is hard to believe that a crime ſo malignant, could be deliberately contrived merely from the malice of the heart; where no previous provocation exiſted, no vengeance was to be gratified, unleſs ſome hope of advantage was to reſult from the deadly deed. But it is not difficult to trace the ſordid motives which operated upon the mind of John Hauer. The teſtimony upon this point is expreſs and concluſive. It was the inordinate deſire of wealth that gave a ſpring to all his actions. So ſtrongly did it influence him, that he was content to grow rich by iniquity; and if his darling object could not otherwiſe be accompliſhed, he was willing to obtain it by imbruing his guilty hands in his brother's blood.

Scarcely had old Peter Shitz grown cold in his grave, that the baſe diſpoſition of the priſoner began to ſhow itſelf. He became diſcontented with the proviſion which his father in law had made for him; and he attempted, without any ground to ſupport him, to conteſt the old man's will; and accordingly entered a *caveat* againſt the probate of it, in the regiſter's office of this county. But he was obliged to relinquiſh this vain purſuit. It is immaterial to inquire why Peter Shitz gave a leſs portion of his property to the wife of John Hauer, than to his ſons. Every man has a right, by the law of this country, to diſpoſe of his own property, by will, as he pleaſes. Probably he might, with an exact eye, have beheld the demerit, and ſordid diſpoſition of his ſon-in-law. Be it as it may, having ſo willed it, it was the duty of that ſon-in-law to acquieſce.

Finding it was not in his power to invalidate the old man's will; in purſuit of the ſame object, he endeavored to work upon the fears of his brothers; the ghoſt of their departed father could not reſt, unleſs they would conſent to ſhare the property he had left behind him, more equally. Gloomy ſuperſtition muſt be called in to work the wondrous effect! Their reverence for a deceaſed parent, and an anxiety that his troubled ſpirit ſhould again repoſe in peace, he ſuppoſed, would induce them to endeavor to atone, by a different diſtribution, for the ſuppoſed injuſtice their father had committed upon earth! Peter Shitz, whom you have ſeen, does not appear to be poſſeſſed of the ſtrongeſt mind. How Francis was, we know not. Probably he differed not much from his brother. Minds ſuch as theirs might be well fitted to receive thoſe ſtrong impreſſions by which ſuperſtition chains down the underſtanding, and keeps it almoſt conſtantly under the dominion of fear. Even in our day, the ſame belief which prevailed among moſt nations in the rudeſt ſtages of ſociety, that the dead can aſſume a viſible form, and reviſit the living, fixes a ſtrong hold upon the weak and uninformed; nor has the bright ſyſtem of Chriſtianity yet been able to eradicate its baneful influence over many minds. Under the powerful dominion of ſuch a belief, there is no knowing how far the infamous art of Hauer might have wrought upon the weak minds of his brothers. But this impoſture was accidentally detected by Hoffman. He dragged the ſpirit from his lurking hole. It was not then unſubſtantial air; but a living body, clothed in fleſh, in the ſhape of Hauer. He intreated him not to tell; but the faithful old man, who had been the

affectionate ſervant of their father, immediately told them of the impoſition. This plan could then ſucceed no more; his deep laid contrivance was detected and expoſed. But ſtill he did not relinquiſh his point. He went on ſtep by ſtep, and every ſtep he took, he increaſed in guilt. He prepared his horrid mind for the moſt cruel actions. The youth and ſimplicity of Peter Shitz rendered him a proper ſubject for his malignant art and practices. He was able to bend him to his purpoſes. He is ſcarcely, at this day, more than eighteen years of age. Credulous to the extreme, he was induced, by Hauer, to believe the greateſt abſurdities. At the period we are now to ſpeak of, Peter lived in the houſe of his brother-in-law. He was, however, deſirous to leave it; and accordingly hired with his couſin at Tulpehocken. This would have deranged the plan that Hauer had formed for his deſtruction. He prevailed upon him not to go, by reaſons addreſſed both to his avarice and his fears. He perſuaded him that every morning, by uſing certain drops, by ſome kind of magic, he might receive a purſe, with five doubloons in it; a mighty charm for him, if he ſhould be able to accompliſh it! But leſt he ſhould be in the way of advice, and better information, it was neceſſary to keep him from his friends. He was told, under the moſt ſolemn imprecations and unmerciful oaths, that Shæfer and Bomberger, the executors of his father's will, were determined to bind him out; that they came every day for him, and declared they would have him dead or alive. Terrified at this, he was induced to conceal himſelf. He dared not to go to his conſin's at Tulpehocken, for there he would be within the reach of his ſuppoſed enemies. By theſe means, with the aid of oaths and falſehoods, he fixed a reſtraint upon the young man's freedom of will and action; and by impreſſing him with an ungenerous fear of his friends, he kept him completely under his own power. This could not be ſuppoſed to laſt long. No time was to be loſt to bring on the tragedy he was about to act. There can be no doubt but that poiſon was, at this time, the means he meant to employ. Whether Hauer was the ſecret occaſion of the general ſickneſs of the family, which has been related to you, by mixing ſomething with their food, without their knowledge, we can but conjecture. He had frequent acceſs to the houſe; and the idea certainly correſponds with all his conduct afterwards. It is a ſtrange circumſtance unaccounted for. The next circumſtance is, his bringing the three phials from Lebanon; and having impreſſed Peter with the idea that the drops in theſe phials were

to empower him to procure the daily purſe; he induced him to drink of them. It is to be obſerved that Peter was reluctant, and unwilling to taſte them; but Hauer aſſured him they would do him no harm. Accordingly, one evening, deſirous to cloſe the ſcene, he perſuaded him to try to procure the purſe; and the better to deceive him, he himſelf drank firſt out of the large phial; but the ſmall phials, which he ſuppoſed to contain the deadly draught, he never touched; and when he thought Peter had taken ſufficiently from them, and that the great end would ſoon be accompliſhed, he told him he would not try that night, he thought it was not worth while!—Can any one then doubt what were his motives in perſuading the boy to drink out of thoſe phials? Fortunately, however, for Peter, Hauer was deceived in his medecine: it turned out to be innocent and ineffectual; the potion he procured from LEBANON WAS NOT STRONG ENOUGH! Failing in this, other means muſt be purſued. Since the drops would not operate, another ceremony muſt be gone through. Under the continued idea of trying for the purſe, he and his brother Solomon led him down to Wolferſberger's barn, a ſolitary ſpot, remote from any houſe, where no aſſiſtance could be had, and where the horrid buſineſs could be carried on without anyhuman eye to obſerve them. But Providence was watchful over the fate of Peter Shitz. The baſe contrivance was again defeated by an unexpected accident; and the young man has providentially ſurvived to tell the diſmal tale.—In this loneſome place, in the ſilence of the night, (under ſuch influence was the weak mind of Peter Shitz) Hauer had addreſs enough to cauſe him to faſten a rope round his neck, with the end of it tied to the upper joiſt of the barn. In this ſituation he was prevailed upon to believe, that a ſpectre would appear with the purſe of gold. When it was thought that he was ſecured, and that nothing upon earth could reſcue him from death, Solomon Hauer puſhed him from his ſtand, that he might hang and die. But the rope broke, and he fell upon the threſhing floor of the barn, which he ſtained with his blood. The miſcreants fled, and left him, in this unhappy ſituation to ſhift for himſelf, and eſcape if he could. Gentlemen, how callous muſt that man's heart be, who could do theſe things! Though all his ſchemes had hitherto been blaſted, yet his hardened conſcience was never touched with remorſe; he ſtill perſiſted in his diabolical purſuit! On their return to Hauer's houſe, Hauer expreſſed a regret that things had all gone wrong. No doubt he was diſappointed in the moſt ardent wiſh of his heart; he panted for the deſtruction of his bro-

thers. By day and by night, for years, it had occupied all his thoughts. It is ſtrange, gentlemen, that after all theſe things, the eyes of this young man were not opened. He ſtill continued the dupe of the artifice of his brother-in-law. He promiſed not to tell: And the better to prevent a diſcovery; and that it ſhould not be known that the ſkin was taken from his neck by the rope, he accompanied Solomon Hauer, by the direction of John Hauer, to their father's plantation near Bethlehem. Had Hauer ſucceeded in this laſt wicked act, it is more than probable he never would have been brought to an account for it. It was artfully conceived; and it would have appeared ſo like an act of ſuicide, that a different ſuſpicion would ſcarcely have been awakened. As the fact really turned out, and perhaps with a view to renew the attempt, we find him propagating ſtories that Peter Shitz was deranged, and that he expected he would endeavor to take away his own life; that in caſe he ſhould fall the victim to his avarice, it might be ſuppoſed to be a conſequence of melancholy or inſanity. He however told different ſtories about it to different people. He related the ſame circumſtance in ways totally inconſiſtent with each other. To Jacob Mehs he declared that Peter had really attempted to hang himſelf; and that he juſt diſcovered him in time to cut the rope; that he ſtruck him until he brought the blood from him, which, if he did not believe it, he might ſtill ſee upon the floor at Wolferſberger's barn. To Wolferſberger himſelf he told only, that he thought Peter would hang himſelf; that he was ſometimes out of his head; ſometimes had a piſtol in his pocket, and ſometimes a rope. That, the ſecond time, he followed Peter to the barn, and found him concealed in the clover hay; that he ſtruck him until he fell upon the floor; and that if he did not believe it, he might go up, and he would ſee the blood upon the threſhing floor. Wolferſberger did indeed go up, and he ſaw plenty of blood upon the barn floor. But he ſaw more; he ſaw what Hauer did not expect or calculate upon; he ſaw the broken rope lying near the blood!—— Gentlemen, it is truth only that is uniformly conſiſtent. When people take pains to conceal the truth, the very means they purſue, for the purpoſe, moſt frequently leads to detection. They will tell ſo many different ſtories that they cannot balance together; when they come to be weighed in the ſcale of probability, no room can remain to doubt of their falſity. Such is the wiſdom of providence, that villainy is often expoſed by the very ways which it ſeeks for concealment.

Every attempt which Hauer made by himſelf, or with the aſſiſtance of his brother Solomon, thus failed. Means more bold and deſperate muſt be reſorted to. That he employed a number of perſons hardened enough to commit the fact, is beyond a doubt. Who they were, is your preſent inquiry. The heavy charge is brought againſt the priſoners Donagan and Cox. The confeſſions of Hauer you have heard read. The Judge has told you that they are evidence only againſt Hauer himſelf, and not againſt the others; that it ſhould not affect them, and that you muſt ſeek for other evidence of their guilt. To all this we agree. The confeſſion, however, proves a very material circumſtance; that a conſpiracy of the moſt dark and dreadful nature was formed to take away the lives of Francis and Peter Shitz; that the price of blood was agreed upon. Who were the actors in this bloody tragedy remains to be inveſtigated. When a conſpiracy is once formed, the act of one conſpirator is the act of all; but then we muſt, it is true, firſt prove the connection between them. The artful management of thoſe concerned in this caſe, has really rendered this difficult. To diſcover them we muſt have recourſe to preſumptions. Some of thoſe preſumptions are of a remarkable nature; and ſhould they even not be deemed ſufficiently ſtrong to warrant a conviction, yet they muſt forever leave the mind unſatisfied of the innocence of the priſoners. We will ſhow you, therefore, gentlemen, how the ſubſequent facts and circumſtances, and matters which will be brought home to the priſoners, are connected with all that happened before, and are exactly of the ſame kind, and appear to have the ſame object as thoſe which preceded, and which relate to Hauer alone, before he had any knowledge of Patrick Donagan. (See 6th Term Rep. 528.) We conceive it impoſſible that ſome of the circumſtances could have occurred, or that ſome of the expreſſions of Donagan can be accounted for, unleſs he had had an intimate knowledge, from the lips of Hauer himſelf, of all that had already been done, and the deſigns he had in view. The connection of Donagan and Hauer, and the time when Donagan firſt became an inmate at Hauer's houſe, more than a year ago, though the force of the obſervation has been endeavored to be weakened, are very material in this caſe. It muſt have been then that the ſyſtem began to be changed. And we think that it will appear that Donagan had an active handin all that followed. Previous to this, Hauer had no knowledge of theſe Iriſhmen, M'Manus and others; one of whom, it is decided, is guilty of the fact; he knew nothing of their diſpoſi-

tions and characters, and their fitneſs for the work of blood. Probably he never would have thought of them, if they had not been brought to his knowledge by their own countryman, Donagan.

But it is ſaid, all this is preſumptive evidence; it is dangerous to rely on it; and they have read to you ſome law caſes upon the ſubject, and have applied them artfully to your paſſions. If not rightly underſtood, they may do much harm, and almoſt in every inſtance arreſt the arm of juſtice. We will endeavor to do away the effect that the gentlemen have deſigned to bring about, in their obſervations upon them, and to ſhow you the true ſtate of the law upon the ſubject, before we proceed further; and we truſt we ſhall not break in upon the rules of law as they really are; for they are founded in wiſdom and propriety.

It is true, gentlemen, it is ſaid in 2 Lord Hale, 289, that it is better five guilty perſons ſhould eſcape than one innocent perſon ſhould die, and Mr. Blackſtone adopts the ſentiment, in his 4th vol. 358. All this may be well enough to induce a reaſonable and neceſſary caution. But the principle is very often introduced, as it has been upon the preſent occaſion, as an argument againſt any conviction at all upon preſumptive evidence.

Certainly, however dangerous it may be to preſume too much from a ſingle, ſolitary circumſtance: yet where a number of circumſtances combine, where they all ſeem to unite, to correſpond, and lead to the ſame concluſions, though any one of them ſeparately might appear trivial and inconcluſive, they will together form a maſs of teſtimony, irreſiſtible, and which can ſcarcely be miſtaken. Why does the law permit you to hear ſuch evidence, if, the moment you have heard it, you are to throw it aſide as deſerving of no conſideration? When a caſe is brought before you, which depends not upon poſitive proof, but upon a variety of circumſtances, tending to prove a certain fact, as honeſt men, regarding the ſolemn oaths you have taken, you are bound to conſider it, with the aſſiſtance of the Court, deliberately and maturely, to give it all the weight it deſerves; and if it carries with it conviction to your minds, it is your duty to act upon it, fearleſs of the conſequences; uſeleſs, otherwiſe, would be thoſe reaſoning faculties, and that capacity to judge, which God has given you. You are

not to reject ſuch evidence, becauſe it may be called preſumptive evidence; nor becauſe a great and benevolent Judge, in the overflowings of his humanity, has declared, that it is better five guilty perſons ſhould eſcape, than one innocent man ſhould die. If ſuch expreſſions are thus perverted, and a weight given to them, which it was certainly never intended, (and it would be unreaſonable) they ſhould have, what, gentlemen, is to become of the juſtice of the country in criminal caſes? Inſtead of five or ten guilty perſons eſcaping, ſcarcely one could be puniſhed. The midnight murderer calls no witneſſes to behold his guilt! If not upon preſumptive evidence, how are you to trace out half the villainies and crimes of murderers and felons? They muſt all remain unpuniſhed. A jury, under the continual dread of doing wrong, are never to do right. In more than half the crimes that are committed, no poſitive proof could poſſibly be procured. How are you to diſcover the dark aſſaſſin, unleſs by tracing the means by which, or the motives for which, he committed the deadly deed? Former grudges, threatening expreſſions, other unſucceſsful attempts, eſpecially where great advantages are expected to reſult from the act; the purchaſe of poiſon, or other inſtruments of death, without being able ſatisfactorily to account for them; and a variety of circumſtances, unuſual and extraordinary in the conduct of men, and which can only be calculated for miſchief, and not otherwiſe accounted for, muſt, as the caſe may be, be brought up, when the unhappy occaſion ſhall require it, to be publicly inveſtigated; and upon their ſtrength or weakneſs, muſt the objects at whom they are pointed, ſtand or fall. But, gentlemen, do the caſes which have been read, lead to the abſurd concluſions you are requeſted to draw from them? By no means. The two inſtances put by Lord Hale, are caſes, where the very killing was never proved. Where it was even preſumed that a murder had been committed, and therefore he tells us, that he never would convict of murder, unleſs the fact of the murder were proved to be done, or, at leaſt, the body found dead. That is not the caſe here; there is no doubt here that a dreadful murder has been committed. That being the caſe, Lord Hale no where ſays that we ſhall not have recourſe to preſumptive evidence to diſcover who the murderer was. He does, indeed, ſay, it muſt be WARILY uſed. Be it ſo. To this we have no objection. Conſider it well; but do not ſuffer yourſelves, by ſuch arguments as you have heard, UNWARILY to reject it.

With reſpect to the caſes in 8 Mod. they are not difficult to be anſwered. Whether they are truly reported or not, we cannot aſcertain here; the book which contains them is certainly not a book of very great authority. Independently of that, the caſes in themſelves carry with them no intrinſic weight. They eſtabliſh no rule of law; nor does any judge undertake to declare that preſumptive evidence is not ſufficient to induce a jury to convict in a criminal caſe. Theſe caſes do indeed inform you, that the evidence being only preſumptive, the juries did not think proper to convict the defendants. What ſort of juries they were; or how they were directed by the Court, no where appears. But in one of the caſes the acquittal ſeems to us extremely ſtrange; we mean the caſe of Sprigg and Oakley. We know not what kind of evidence that jury might require. The running the goods on the coaſt of Ireland; the repair of the boat; the rapid increaſe of the water; the owner remaining under deck all the time; the circumſtance of the purchaſe of an uſeleſs auger; the refuſal of the maſter to ſuffer the ſailors to go down into the hold for the purpoſe of a ſearch; and, above all, the falſe pretext that both the ſhip and cargo were loſt, when the cargo had actually been landed in Ireland, pointing out the great object of the deſtruction of the ſhip, we conceive ought to have placed the matter beyond a doubt with reaſonable men. That jury do not appear to have been ſuch. There have, however, been juries who have acquitted againſt the plaineſt proof; there may be ſuch again; and thoſe caſes might be brought to apply to the preſent, equally as well as the two caſes in 8th Mod. We think no jury in this country could reſiſt ſuch evidence as was produced in that caſe. The beſt that can be ſaid for theſe caſes, is, that the facts of burning and ſinking the ſhips did not concluſively follow from the circumſtances proved; they might have happened from other innocent circumſtances.—But then this abſurdity follows, that a bare poſſibility of innocence, is, in ſuch caſes, to deſtroy the moſt rational ground of preſumption of guilt. Upon the whole, we hope this jury are to be guided by their own judgments; and not by what a jury in any other caſe has done; when for aught we know, that jury might have been compoſed of the moſt ignorant or the moſt corrupt of men. As to the caſe in 8th Mod. 249, where Gilbert is made to ſay, "that a man ſhall not be found guilty and hanged upon preſumption," it falls within the caſe cited by Lord Hale; a man was indicted for ſtealing the goods of a perſon unknown, merely becauſe he would not give an account how he came by them; and he was thought to be too poor

to come by ſuch property honeſtly ; but no felony was proved ever to have been committed, nor were they able to ſhow any other owner of the goods. To have convicted in that caſe would indeed have been to have built up preſumption upon preſumption.———Gentlemen of the jury, we will drop this point. The evidence is properly admiſſible ; you are to judge of its force ; we have endeavored to do away any improper effect which the reading of thoſe caſes by the gentlemen may have had ;—and we leave the law as it really ſtands.

If, gentlemen, you compare all the evidence together, you will find it ſo connected, that the latter circumſtances could not have exiſted without the former. Can it be reaſonably ſuppoſed that Donagan was ignorant of the deſigns of Hauer after what you have heard? Who but Hauer could have informed him of the wiederkomme drops? A ſtranger to this country, unacquainted with German terms and expreſſions, where could he have acquired the notion of any ſuch thing, unleſs by reaſon of his intimacy and connection with Hauer? For we do not find any other perſon than Hauer, who knew any thing about ſuch a medicine, or that had ever heard of the name. And we well know they were drops ſo called by Hauer, and he had attempted to make uſe of them, long before we hear of any acquaintance between him and Donagan. We think it is very evident, too, that he knew the object to which they were to be applied. But to oppugn this, you are told that he was under a belief of ghoſts, and that he wiſhed, for certain purpoſes, by means of thoſe drops, to raiſe up the ſpirits of the dead ; that he had heard of this magic power attributed to theſe extraordinary drops, and was anxious to procure them for the purpoſe of experiment. Strange ſuggeſtion ! They have told you that Donagan does not want underſtanding ; and yet they would have you believe him to be the veriеſt fool upon earth! What man is there of any underſtanding, who can for a moment ſuppoſe that the grave can yield up its contents, or that departed ſpirits have power to hold converſation with man! Theſe are all the viſionary chimeras of an heated brain! the creation of a diſturbed fancy! For the minds of thoſe who are under the rational influence of the religion we profeſs, muſt diſcard ſuch ideas ; and muſt be perſuaded that the grave has not the power to ſurrender up its dead, until the laſt trump ſhall rouſe them from the long ſlumber of ages! That he deſigned to procure wealth by means of theſe drops, we believe. But

it was by adding to the number of the dead, that he expected to accomplish this end. How else do you account for his anxiety, and his earnest desire to procure the drops, when he was in company with Hauer himself, if he had not known the use to be made of them? if he had not been acquainted with the whole secret? For you will observe, that when Hauer procured the drops from Dr. Luther, who then lived at Lebanon, and when he pretended to have got them from Bethlehem, he had no acquaintance with Donagan. How then did Donagan become possessed of a knowledge of all these facts and circumstances, unless from an intimate communication between him and Hauer respecting it? For he declares to Dr. Stause, that he had got some from Bethlehem, and from Dr. Luther before, but they were NOT STRONG ENOUGH. Now from this expression of Donagan, can you doubt for a moment that he knew all about the potion that had been administered to Peter Shitz, and that it failed in its operation; it was not STRONG ENOUGH to produce the desired effect? His conduct at Orndorf's is also remarkable; his rising in the price so rapidly; his repeatedly calling for it. It did not suit him to go to Dr. Luther. His potions were not STRONG ENOUGH. Why wish to procure the drops by means of third hands? If they were harmless and innocent, why did he not at once go to Fahnstock and others himself, where he declared such medicine was to be procured? It would rather appear, that by his earnestness—by the sums offered, and by his demand of an unknown medicine, he wished to tempt and seduce the persons to whom he applied to anticipate him, and to give him a deadly poison. It is said we have not shown the drops were poisonous, nay more, we have not shown the drops themselves. We cannot tell what they were. We know of no one who can give us any information about them. But that Donagan was in search of a deadly poison, is beyond conjecture. Why else his suggestion, that he knew it was a medicine that the Doctors DID NOT LIKE TO SELL? Why so many dark hints about it? Why desire to procure it at any price—beyond the value of any medicine yet known? Why his repeated declarations that he meant no harm with them? Why did he declare to Dr. Kœnigmacher, that he would bind himself in 1000 or 10,000 dollars that he would not hurt a living creature with them? Why all this, we answer, if it was an harmless liquid, and not a deadly poison, which he was in search of? If it was not to contain in it the power to harm, these expressions could mean nothing. That he meant to try projects as Dr. Stause called them, is morally certain; but they were projects of the most malignant kind!——

Gentlemen, the circumſtance of the powder has been treated with much levity by the counſel for the priſoners. That it might have been purchaſed innocently is true. That this may not be the ſame powder, is alſo poſſible. It would have been more ſatisfactory if Donagan had attempted to give any evidence of the purpoſes to which he had applied the powder, which, it is beyond a doubt, he purchaſed of Mr. Kapp. One would ſuppoſe this would have been within his power. If he had been making any innocent uſe of gunpowder after that purchaſe, either by blowing rocks or otherwiſe, he might eaſily have ſhown it. His not doing ſo gives conſiderable weight to the circumſtance; and though in itſelf it is inconcluſive; and even the reſemblance of the grain, and the paper, with the ſamples produced, and the form and appearance of the bag are not infallible proofs; yet taking it with the other circumſtances, it gathers ſtrength. The ſmallneſs of the quantity found, (there being but half a quarter of a pound purchaſed of Kapp,) being inſufficient for almoſt any other purpoſe; and in the ſame kind of bag; purchaſed by a perſon who was the inmate of Hauer, comparing it with all that went before, with their joint reſearches for the wiederkomme drops, and with the fatal event that followed, the death of Francis Shitz by means of the powder out of ſuch a bag, and Donagan not attempting to account for any other uſe made by him of the powder he purchaſed; renders it extremely probable it is the identical powder purchaſed by Donagan, to be uſed for the horrid purpoſe actually effected by it; and that he knew it, and that of courſe it ought to be conſidered as very material, and forming a weighty part of the great maſs of evidence in this caſe—But the jury will give it ſuch weight as they think proper. We have done our duty in bringing it before them.

Gentlemen, all theſe men are lately from Ireland; and it is ſurely worthy of remark, that, Hauer had no knowledge of any of them until after his intimacy with Donagan. How elſe was M'Manus, who was to become a principal actor in the bloody ſcene, introduced to the acquaintance of Hauer, if not through the means of Donagan? Donagan, from his knowledge of theſe men, muſt have procured them to commit the murder. He muſt have been the agent, the contriver; he muſt have aſſiſted intimately in the general plan. Is it reaſonable to ſuppoſe that Hauer, without any knowledge of M'Manus, who had lately come into the country, would have acted ſo

wildly as to have communicated ſo important a ſecret to him, unleſs he had been directed to him by Donagan, who was intimate with him, who muſt have known him and his bloody diſpoſition well? Is it probable, if we muſt reaſon ſo much upon probabilities, that theſe men could have been ſearched out or procured in any other way, than by the interference of Donagan? We find Donagan and M'Manus frequently together. Gentlemen, it is no trifling circumſtance, their being together at Logan's, where M'Manus had the two odd piſtols, highly charged. That thoſe very piſtols were at Shitz's houſe on the night of the murder, is to be preſumed from the ſingular circumſtance, of the uneven ram-rods found in the houſe; one was longer than the other; ſo was one of theſe piſtols longer than the other; the old one was a little longer than that which appeared to be more new.—The time when theſe piſtols were ſeen by Miller in the poſſeſſion of M'Manus, correſponds very well too, with the time mentioned by Kapp, when the powder was purchaſed of him by Donagan. The coincidence of circumſtances is ſurely remarkable.———

As a proof of the innocence of Donagan, it is contended that he was ten miles from the ſcene of action, on the night of the murder, in a reſpectable houſe. It is true this is ſo proved, by a character highly reſpectable. But what is that to the purpoſe? It matters not where he was after he had ſet the whole machine in operation; it cannot poſſibly tend to prove his innocence. If we had indicted him as principal, then this circumſtance might be material to be inquired into; but we have charged him only as an acceſſary before the fact, and not at all as being preſent: ſo that his being ten miles off concludes nothing. This circumſtance, however, requires a little more examination.—We cannot conceive that his being at the houſe of George Illig is any proof of his innocence. It rather appears to correſpond with a general plan, artfully contrived beforehand, with a view to avoid detection. It is ſomewhat ſingular that he left his home at this very time. Who can heſitate to believe that he purpoſely went away, in order that Hauer might bring ſome ſtranger into the houſe who might be a witneſs for him; and accordingly Baker is brought there to ſleep in the room with Hauer and his wife; which he had never done before. When he came there he naturally aſked for Donagan, and was told he had gone away that morning to Illig's. He then aſked for M'Manus's wife. Charles had taken her away—ſo that it ſeems to have

been agreed, that the whole knot ſhould ſeparate, and each one of them have a voucher as to his being in a certain place on that night, in caſe ſuch evidence ſhould be required at a future day.——From the declaration of Hauer to Baker, it would ſeem as if Donagan had left his houſe in the morning; it was not until night that he went to Illig's. What he was about all that day he has not attempted to explain; it is left to be conjectured; moſt probably he was aſſiſting to arrange the horrid buſineſs which was to be tranſacted in the night. He has thought that it would be ſufficient if he could make it appear that he was in a decent houſe at the time of the murder. Accordingly he was to be at Mr. Illig's. Baker was to be at Hauer's. M'Manus was to procure ſome one to be a witneſs for him. He endeavored to procure Caffry, and actually took Cox with him to the houſe of Geiger.*—Thus the whole buſineſs ſeems to have been preconcerted; and this at once accounts for Donagan going to Illig's on that very night. It was the purpoſe of procuring a good witneſs in Mr. Illig. What was his conduct when the officer came to arreſt him? He did not appear to be concerned. There was no change in his countenance. The charge againſt him of ſo dreadful a nature ſeemed to ſtrike him with no terror, or apprehenſion. He muſt have expected this, and have been prepared to act that part; accordingly he turned round to Mr. Illig, and with the greateſt coolneſs and indifference, aſked him for a few lines that he was there all night. This muſt have been his object from the firſt. If he had been innocent, he moſt probably never would have thought of demanding ſuch a thing. Nor would a man of the pureſt heart, who ſhould be thus ſuddenly charged with having committed a murder, bear up with the ſame preſence of mind: However innocent, it is almoſt impoſſible to meet a circumſtance of that kind with the ſame firmneſs and unconcern which Donagan evinced. His mind, therefore, was prepared for the event; he had ſettled the part he was to act upon the occaſion.

One of the ſtrangeſt ſuggeſtions has been made which we have ever heard: That Hauer was the projector of the necromancy, which was probably deſigned to hang Donagan, inſtead of hurting Shitz, and to ſweep Donagan's

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* It would ſeem from Hauer's confeſſion, that the ſame plan was to be purſued by M'Donough who was to have witneſſes in the houſe; but was to get out privately behind the bed, through a hole in the wall.

money into his own pocket; and that Hauer's character and conduct ſeem to lead to this concluſion. Now, how is all this to follow? or how would the deſtruction of Donagan have put his money into Hauer's pocket? We have been told Donagan was POOR, but honeſt. What object would his one or two hundred pounds have been to Hauer, if he could even have procured it by Donagan's death, in compariſon to the eſtate of the Shitz's whom they ſay it was not intended to hurt? But Hauer would not have got the money in caſe of his hanging Donagan; he was not his heir; nor was any of his money in Hauer's hands; but all lodged, for ſafe keeping, with Mr. Illig. How abſurd, then, is ſuch an obſervation. It is like the very many conjectures which the gentlemen have made upon this occaſion, which have no premiſes to ſupport them.

It is ſaid that it could not have been deſigned to poiſon by theſe drops; that if that had been the intention, ſix pence worth of arſenic might have been got, which would have been ſufficient for the purpoſe. But, gentlemen, this would not have anſwered.—The poiſoning by arſenic is the moſt eaſily diſcovered of any poiſon that can be procured. It ſeldom fails of detection. It muſt be mixed with ſome food, where it can be ſeen, or with ſome drink, where it would leave the ſettlings behind. The poiſoning by arſenic has moſt commonly furniſhed the means of diſcovery. Beſides, it is a well known poiſon to moſt people. Large quantities are daily purchaſed for the deſtruction of rats. In this caſe it would not have anſwered the purpoſe. Peter Shitz, eſpecially, was to be ſeduced with a belief that certain drops, uſed in a particular way, would put him in poſſeſſion of great wealth. The potion was to be adminiſtered under this diſguiſe. Arſenic would not have anſwered the purpoſe; he would have known what is was. His death would have been accompliſhed long before, but the drops happened not to be ſtrong enough, as Donagan himſelf declared. He would not, therefore, go back to Luther for them; but he endeavored to ſearch out for ſtronger drops, for the real ſtuff, as he called it. That he was in ſearch of poiſon, we truſt we have fairly ſhown from his own expreſſions, eſpecially, that he would do no harm with them; and would give ſecurity not to hurt a living creature; which would have been abſurd if the ſtuff he was in ſearch of was innocent and harmleſs.

It is ſaid, Donagan did not fly, when he was diſcharged by the juſtice; nor when he was again arreſted and diſcharged the ſecond time; and this is a ſtrong proof of his innocence.

No, gentlemen, he did not fly; and for the very reaſon which the counſel have given. That indeed, would have been A MARK OF HIS GUILT. He knew better. He was rejoicing in the ſucceſs of his ſcheme; and having eſcaped would more naturally ſuppoſe that his innocence had been made manifeſt, or rather that his guilt could not be made to appear. He muſt have conceived that he had managed matters with ſo much art and addreſs, as that his ſhare in the bloody tranſaction could never be proved upon him. And, therefore, he was cunning enough not to attempt to fly, as it might have blaſted all his ſchemes; and have furniſhed a ſtrong addition to the maſs of circumſtances, in caſe he ſhould happen afterwards to be apprehended. This, therefore, proves nothing for him.

We think, therefore, taking all the evidence, and comparing one circumſtance with another, it ſtrongly implicates Patrick Donagan in the guilt of this murder. It is impoſſible he could have been a ſtranger to this horrid conſpiracy to take away the lives of two innocent men, from the worſt of motives. His whole conduct can not be accounted for in any other way, than by ſhowing him to be a party concerned; and it muſt have been him and him only, who could have brought Hauer to the knowledge of the perſons and characters of M'Manus and the other Iriſhmen who aſſiſted in the execution of the plot. Hauer's conduct, conſidering this in any other point of view, was that of a madman; and without having the minds of theſe people prepared by one who knew them well, it would have been ſtrange indeed for him, without any previous knowledge of them, to commit himſelf to them, unleſs he did it by the aid of ſome other perſon who muſt have been greatly in his confidence. Every probability points out Patrick Donagan as the inſtrument, and adviſer of Hauer, in procuring theſe bloody hands for the purpoſe of wreaking his vengeance on his two brothers-in-law.——— With theſe obſervations we commit him to your hands.

Francis Cox, gentlemen, is the next object of your consideration; and we humbly apprehend, that the circumstances against him are irresistibly strong. Not only persons procuring, but those who even consent beforehand, are accessaries before the fact. For under the word AID are comprehended all persons counselling, abetting, plotting, assenting, consenting and encouraging to do the act, and not present when the act was done. Foft. 126.—If he went to the house of Geiger, with a knowledge of what was to happen, which is the circumstance to be inquired into, and with a view, if any future occasion should require it, to add perjury to murder, by becoming a witness for M'Manus, and endeavouring to conceal the truth of the fact, (which does not call for the strongest faith to believe) then is he completely within the spirit of the law. It is said, however, with an air of triumph, (and almost every witness was asked the question) that Francis Cox was never seen in the neighbourhood of the Shitzes, and that he was a stranger to John Hauer. But of what consequence is the circumstance? It is not necessary to prove that he ever was there, or that he ever beheld John Hauer before the fatal murder. The only point in issue is, whether HE AIDED IN THE MURDER OR NOT; this may be done in a variety of ways; and altho' he never combined with Hauer or Donagan or M'Donough, yet if he assisted M'Manus, if he combined with, and was accessary to him, it is all we are bound to prove—for a man may be accessary to one and not to the other. He may even be a procurer of a murder, and yet never have seen the actual perpetrator of the deed. If Hauer procured M'Manus to commit the murder, and M'Manus called in the aid of Cox, surely it can be no defence for Cox that he never saw Hauer! Why the gentlemen have taken hold of so very trifling a circumstance we are at a loss to know, unless it be, that they are staggered by the strength of the evidence, and know not what to say.—Foft. 125—6.

It is contended that the evidence does not furnish any degree of probability that Cox was concerned, but loses itself in doubt, conjecture and uncertainty. Let us examine the force of this suggestion. We find Cox, on the night of the murder, sleeping at the house of Geiger, in consequence of a pre-concerted plan for that purpose; because all this had been arranged before at Manheim. Is it not then a very constrained presumption, to suppose that he did not know what he went there for—that he never asked anyquestion about

it? You are not only to conjecture this, but you muſt go further, and you are to take it for granted that he is a fool and an ideot; that he was the dupe of a young fellow like M'Manus, and a number of other conjectures, which are raiſed up, like magic, to do away the effect of the concluſion, which will naturally be drawn from the whole conduct of Cox. He and Caffry are to be carried to a certain houſe, to remain all night, for a conſiderable reward, and yet are not to know what they are to do there. We find Caffry very naturally aſking for what purpoſe he was to go there; but he is not to be told without taking an oath to keep it a ſecret. It then naturally ſuggeſted itſelf to him that ſomething improper was deſigned, and he refuſed to go; though the idea was held out to him that for the mere act of going to the houſe, and to remain there, while M'Manus was to go out, he was to receive ſo much money as would keep him from the neceſſity of working hard. But Cox is not to poſſeſs the ſame preſence of mind. He is to be led, like a fool, into the difficulty without knowing what he is about; he is ſaid to be the dupe of M'Manus. In the next moment he is to have wit and reflection enough to ſuppoſe that M'Manus meant to run away with ſome rich heireſs —and yet is to give him no aid in this ſcheme, but to lie quietly in the houſe. What a variety of ſuppoſitions the gentlemen can now furniſh for Cox to juſtify his conduct; and you are to wander, gentlemen, into what his counſel have called a wide field of conjecture, to try if poſſibly Cox might not have been gulled into all this; and you are to dream very hard that he is ſo great a dunce as to be impoſed upon by the moſt frivolous pretences. Unfortunately, however, all theſe ſuppoſitions end in abſurdity. Again, M'Manus had borrowed a ſaddle from Geiger; and you are told that he might have held out this as an inducement to Cox, in order to diſguiſe his real object; and that the returning of the ſaddle appeared a plauſible reaſon for his going to Geiger's. Well, then, two men are to be hired, at a great expence, to go a conſiderable diſtance, to ſleep at Geiger's, becauſe M'Manus had borrowed a ſaddle and wanted to return it! And when Caffry would not go, although the ſtrongeſt of temptations, money, was held out to him, ſuppoſing it to be ſomething wrong, on account of the myſtery which appeared about it; Cox's eaſy credulity ſuffers him to be ſeduced away, and to be led up to Geiger's, partly on foot, and then riding by turns, in the ſeverity of winter, to witneſs M'Manus returning a ſaddle! This is of a piece with the other conjectures. The only rational way of accounting for

this conduct is, that Cox and Caffry were wanted as witneſſes, that they might be able to ſwear, in caſe M'Manus ſhould ever be charged with the murder, that they went to bed with him in the evening, and that they roſe with him in the morning, at a place five miles diſtant from the fatal ſcene; and as to the intermediate time, of courſe they would be aſleep, and not undertake to ſay any thing about him. It was for the purpoſe of perjury, then, that theſe men were wanted. Nor is it unlikely that they were to aſſiſt M'Manus in getting out of the houſe without the knowledge of Geiger's family; they would have ſlipped him out of the window, and let him in again on his return, as has been ſaid by Mr. Clymer, Cox might have done, had he known any harm was intended; this, we ſay, was moſt probably the ſyſtem that was to be purſued; and then Geiger and his wife would alſo have been impoſed upon, and without knowing the ſecret tranſactions of the night, they alſo would have been brought as witneſſes that M'Manus ſlept in the houſe all night, and would have gone far to have acquitted him, from that very circumſtance on his trial. But Providence ordered it otherwiſe. The three Jerſeymen came to the ſame houſe, on the ſame night: two of them ſlept in the ſame room with Cox and M'Manus; it therefore became impracticable to let him out of the window; it could not be done without a diſcovery, which would immediately have led to a ſuſpicion that ſomething wrong was going on. It therefore became neceſſary for M'Manus to make his way out as ſecretly as he could, which he endeavored to do, but the landlady had locked the door, and he was diſcovered. It was too late to draw from his purpoſe, and he was determined to go on at all riſques. It was further contrived, that by rattling ſome ſtones on the roof of the houſe, he was to be let in by Cox. And when he did return, ſtill in hopes to elude ſuſpicion, he did throw ſtones on the houſe, although he muſt have ſeen the light through the window, and that the people were up. It is ſuggeſted that Cox had no motive for all this; that there was nothing to induce him to aſſiſt in this tragedy. If we make out a ſtrong caſe, and the circumſtances ſpeak loudly as to his guilt, which we believe they do; it is immaterial whether he had any motive or not: or whether he aided the diabolical ſcheme merely for the ſake of miſchief. But we are ſcarcely left to conjecture that his iniquitous ſervices were to be repaid by a large reward in money.——

The myſterious ſcene at Manheim has called forth many obſervations from Cox's counſel; and is ſaid by them, as one would ſuppoſe they would ſay, that it furniſhes no evidence of guilt. It is their duty, ſpeaking for their client, to weaken the circumſtances as much as they poſſibly can. They tell us, among many other things which they have ſuggeſted, that Cox did not hear and underſtand what paſſed between M'Manus and Caffry, and of courſe was not privy to M'Manus's deſign; and 2ndly, ſuppoſing he did hear, it is only doubt and conjecture, that he knew what M'Manus's views were, and not ſuch proof as the law requires.

We have already anſwered this ſecond ground. If guilt may be fairly and rationally inferred from the circumſtances; and the concluſions are ſo ſtrong, that a reaſonable mind muſt naturally aſſent to them, as fair inferences from the premiſes, we cannot conceive that you ought to reject ſuch proof, becauſe there is a poſſibility you may be deceived. Human reaſon is in its nature fallible; and in this caſe, although every other way of accounting for Cox's conduct is ridiculous and abſurd, yet you are told you muſt ſeek out, by every means in your power, whether there is no other poſſible way of accounting for it; and however fooliſh that way may be, you are yet to ſeize upon it to acquit the priſoner. You are to uſe every effort that a man, whom you can ſcarcely doubt to be guilty, ſhall eſcape, leſt by the remoteſt poſſibility on earth he might be innocent. In ſhort, gentlemen, all preſumptive proof is liable to the ſame objection. The ingenious man may invent a variety of ways by which certain facts might poſſibly have happened independently of thoſe circumſtances from which they moſt naturally and moſt probably follow. Then you muſt ſacrifice your natural reaſon, you muſt diſregard all conſiſteney and probability, and ſurrender up your beſt judgment to the moſt fallacious and abſurd arguments that can be made uſe of. In ſo doing, you would give a moſt fatal ſtab to preſumptive evidence. You would ſcarcely have it in your power to puniſh any murderer. Becauſe there is ſcarcely a caſe in which poſitive evidence can be procured; they muſt moſt frequently be convicted upon preſumptions, or eſcape altogether.—Now to ſuppoſe that Cox's intentions were innocent, and that it is mere doubt and conjecture that he knew what M'Manus's views were, is to conjecture too ſtrongly on the other ſide; you muſt not only do this; a ſingle conjecture will not do; you muſt ſet him down for an ideot.—

It is to be obſerved that M'Manus had no knowledge of Caſſry. The young man left Derry, May was two years, in the ſame ſhip with Cox. He was therefore well known to Cox. He had been his ſhip mate. It was Cox therefore who pointed out Caſſry to M'Manus; he ſuppoſed that as he was quite a lad, working journeyman's work at a ſhoemaker's ſhop, without any property to depend upon, that he might be readily induced to come into every meaſure they might wiſh. But they were diſappointed. When M'Manus wiſhed for another witneſs, whoſe conſcience, for the ſake of gain, would bend to circumſtances, Cox naturally turned his eyes towards Caſſry. We find Cox, this fool and dupe of M'Manus, taking an active part in the buſineſs; he is really the agent, contriving to bring Caſſry into the ſcrape, and managing a meeting between him and M'Manus for that very purpoſe. For, gentlemen, it was Cox himſelf who ſuggeſted to Caſſry that he wanted to ſpeak ſomething to him, and appointed the meeting in the evening. When Caſſry went up, Cox was buſy about ſome law buſineſs before the juſtice; and he aſked him what it was he wanted; Cox told him to wait till the buſineſs was done, and he would tell him. Well, then, as ſoon as the buſineſs was finiſhed, and they left the houſe of the juſtice, Cox artfully contrived to leave M'Manus and Caſſry together, and he himſelf walked before with Bretz, without regarding Caſſry at all. It was at this period that M'Manus made the propoſitions to Caſſry.—They went on to Cox's houſe, yet all that night Cox ſaid not one word to Caſſry, although he contrived the meeting, for the purpoſe, he ſaid, of ſpeaking to him about ſomething or other. Surely then it is no myſtery what that ſomething was. It could be for nothing elſe than to introduce him to M'Manus, and to give M'Manus an opportunity to accompliſh what he had in view.———But you are told ſo innocent and free from deſign was Cox, that he was taken up with his law ſuit, and had forgot every thing about it, and it could not be any thing that would intereſt his mind. To us it appears concluſive, that this was what Cox deſigned; that he had no other views; that he did not wiſh to ſpeak to him on his own account; but merely to give M'Manus an opportunity to bribe him into a participation of the crimes which were to follow. You are further told that Cox could not have overheard what paſſed between Caſſry and M'Manus. Well, be it ſo—what will be the effect of this?—Simply this; that Cox knew all that was going on; that the plan had been contrived between him and M'Manus before, to

ſeduce this young man. How elſe do you account for his converſation with Caſſry a day or two after—when he aſked him if he would do what they had been talking of before? How did he know what M'Manus wanted him to do, or what their converſation was? By inſpiration! Or rather (more natural is the ſuggeſtion) by communication between him and M'Manus about it, or by the pre-conceived ſyſtem which they were endeavoring to carry into execution. Every other way of accounting for it is irrational and abſurd. To a reflecting and intelligent mind theſe ſtrange circumſtances, taken all together, muſt furniſh the ſtrongeſt probable evidence, that Cox knew all that was about to take place; that he himſelf had embarked in the villainy; that he wiſhed to draw in his ſhip-mate Caſſry; and that he himſelf was ready and willing to act the part aſſigned to him; and to take his ſtation at Geiger's, for purpoſes which need not be repeated.—— We muſt therefore, now, trace him to the houſe of Geiger. You have heard the obſervations made by his counſel, in his behalf, upon the circumſtances which happened there. Every thing is ſaid to ariſe from the pureſt motives, and from the moſt conſcious integrity.—This man who was a dupe and a fool before, now, from the firmneſs of his conduct, which could only be upheld by the rectitude of intention, gives the lie to every ſuggeſtion of guilt. He is not alarmed at any thing that took place, but remains unmoved at the confuſion that the abſence of M'Manus created in the family—let us ſee, gentlemen, whether his conduct does, as is contended, indicate a heart free from guilt.

When Geiger and his wife became apprehenſive on account of M'Manus, and were afraid that his life would fall a ſacrifice to the ſeverity of the weather, as he had gone out, in a very cold night, but thinly clothed, Cox appeared altogether undiſturbed at the circumſtance. For a long time he refuſed to aſſiſt in ſearching for him. At one time he pretended he had gone after the girls. If he had had this ſuſpicion; or if M'Manus had even held out this idea to him, why, having once mentioned it, did he not perſiſt in it, as a reaſon why he did not chooſe to trouble himſelf about it. Why, if he believed any thing like this, did he at all carry on the farce of pretending to hunt for him? It would indeed have been a fooliſh circumſtance to have travelled ſo far from his home, to ſleep in a houſe, while M'Manus was to creep out upon ſome amour.—He could not have believed any thing like

this; and his wiſh to impoſe upon Geiger by hinting ſuch a matter, leaves the mind ſtrongly impreſſed with the idea that he wiſhed to conceal the truth. But there is more in his conduct upon this occaſion. When he found that this circumſtance had no effect upon the family, but that their uneaſineſs continued; he told Geiger, that he complained of a belly-ache, and he had lent him his handkerchief to go out.—Then it becomes more unaccountable, if he believed this, that when M'Manus went out, half naked, in extremely cold weather, complaining of ſickneſs, that he ſhould have no apprehenſions on his account—expreſs no uneaſineſs or alarm, at the length of his ſtay. If he had ſuppoſed that was the only object which M'Manus had, it would have been more natural to have been anxious and uneaſy about him, leſt ſome unlucky accident had happened to him. As a man, he could not have been ſo reluctant to aſſiſt in the ſearch for him. The real truth muſt have been, that he well knew the errand M'Manus had gone after; and he knew that all ſearch would be in vain.—You have heard, when he did go out, that he ſearched about but little; that it appeared in him more like pretence; that he ſtood aloof, and ſoon retired, before the reſt, to his bed. When he came from the chamber, he at once put on the ſlippers which M'Manus had carried up, without looking for his own ſhoes, or expreſſing any ſurprize at their diſappearance. If he had ſuppoſed M'Manus to be ſick, it was baſe and inhuman, with all the unconcern in the world, to retire to his bed, and leave his companion, for aught he knew, to periſh in the cold.—No, gentlemen, his whole conduct ſhows that he knew he was telling a falſehood. Beſides, if he had been going only out of the houſe, on account of a temporary ſickneſs, why was it neceſſary to ſettle the plan with Cox, of throwing ſtones upon the houſe, that he might be let in unknown to the family.—All theſe inconſiſtencies in the conduct and ſtories of Cox, moſt certainly do ſpeak a language very ſtrong indeed.—When M'Manus returned, about 3 o'clock in the morning, Cox was the only perſon who heard him throwing the ſtones upon the roof of the houſe. He accordingly came down as ſoftly as he poſſibly could; and when he found that the family were ſtill up, he perhaps thought it more prudent to acquaint them that M'Manus was out there; he opened the door, and ſaid M'Manus was down there that they had been hunting for, that he had thrown ſome ſtones on the houſe, and wanted HIM to let him in: and he had come down to let him in.—It is remarkable, then, that Cox was vigilant, waiting for this very ſignal: that he immediately

roſe, expecting he might have got M'Manus in privately, which was their great object. For unleſs this was the object, why was it neceſſary to rouſe up Cox for the purpoſe, when the lamp was burning, and the people might be ſeen to be up, through the window.—Unfortunately for them, the family was up, and Cox could not have opened the outer door without a diſcovery; he accordingly acted the part we have juſt repeated to you. He then went to the door, and let M'Manus in; and ſaid, damn your ſoul, Charley, where have you been, to make us hunt you all night. But Charley made no anſwer.

In the firſt place, Cox had not been hunting him all night, he was waiting for his ſignal, in his bed; and in the next place, it appears too much like affectation, and an anxiety on the part of Cox that the people ſhould believe that he knew nothing about where M'Manus had been.—With theſe obſervations, without enlarging more upon it, we leave this part of the evidence to your deliberate conſideration.—As to the ſcene in priſon, we ſhall ſay but little. You have heard it as it happened. What it meant we can but conjecture. That theſe men have been concerned in ſome dreadful ſcene of blood, we can have no doubt. Whether it alluded to a murder different from the one now trying, or not, we cannot tell. It is pretended that it could have meant nothing; becauſe Cox in the morning refuſed to tell it. This ſurely can prove nothing; becauſe in his cooler moments his prudence might have returned, and he might naturally have ſuppoſed that a diſcloſure would be attended with too much danger to himſelf; and the greateſt of criminals, remain until the laſt moment, under the hope of acquittal.—We have thought it our duty to lay the circumſtances before you; treat it as you think it deſerves.

We have thus briefly conſidered the evidence as it has appeared againſt the priſoners, and have made ſuch obſervations as appeared to us the evidence deſerved. We conceive that it is entitled to more weight than the counſel for the priſoners are willing to allow; and that it does not merit the many trifling epithets which have been ſo freely applied to it.

One of the counsel has said, that innocence is as bold as a lion; and that the firm and undaunted countenance of the prisoners indicates that their minds are conscious of innocence, and that they are not under that dread, which is the consequence of guilt. Gentlemen, there is no trusting to appearances, they are extremely deceitful.—Yet let us observe, that the mere circumstance of being brought before this solemn tribunal, for trial of life and death, on a charge like the present, would naturally affect the mind, as well as the countenance of any man, who had not become callous, and hardened in iniquity. Look upon your prisoners; it is true they appear to brave the storm that threatens them. Indifferent to all that passes, they seem indeed composed, regardless of what may happen. We do not agree with the gentlemen, that this is a proof of their integrity.——They appear to us to possess rather the hardened front of guilt than the serenity of innocence; and their boldness must disgust more than it will attach in their favors.

But their characters are said to be good, that they have behaved well and acquired a good reputation from all who knew them. In answer to this we say, they have not been long enough in this country to acquire a character. Character cannot be judged of from the mere circumstance of the industry of a year or two, for the purpose of procuring a living. Expose it to temptation; and if after the fiery trial it comes out unspotted, it then and not until then, becomes fair fame and honor. Much wickedness may lie concealed in the heart, waiting only for occasion to call it into action. Many a hypocrite will deceive the generality of mankind by external appearances, by an assumed sanctity of manners, while all their apparent good conduct is but a cloak to their maliciousness. There are many others who do not become wicked all at once; but incapable to resist temptation, they slide from one evil to another, till at last they sully that fame which was bright before. These men have not had time to establish a character here. The testimony is all of the negative kind; the witnesses have heard no harm of them before. There can be no reliance on such evidence. Their honesty remained to be put to the test.--A man who becomes a knave is not always discovered as soon as he becomes so. He may be reputable this year, but of evil fame the next. This has happened to many. If in this case the evidence is powerful and convincing, although only presumptive, their former

reputation will avail nothing.—The face of nature itſelf, which to day is all ſerene and lovely, to-morrow may be enveloped in clouds, and darkened with the ſtorm.——

We have now, gentlemen, done our duty. We commit the priſoners into your hands. It is a moſt ſolemn charge. The duty muſt be a painful one to you; but you owe it to your country to perform it with a good conſcience. If you do juſtice you have nothing to fear. And we are fully perſuaded that you will judge them as your unbiaſſed conſciences ſhall direct you, regardleſs of conſequences; and that when you return to this bar, your verdicts will be the reſult of your beſt judgments, whether that may be that they are guilty or not guilty.——

[MEM. Notwithſtanding what is ſaid in pa. 86, that the ſumming up would be given as one ſpeech on each ſide—yet the rule is adhered to only on the part of the Commonwealth—as it was thought adviſeable to give the ſpeeches of Mr. Clymer and Mr. Hopkins ſeparately.]

The Preſident of the Court charged the jury in the following manner:

GENTLEMEN OF THE JURY.

The indictment upon which you are now trying the priſoners at the bar, charges Charles M'Manus and Peter M'Donough as principals; and the priſoners as acceſſaries before the fact. Charles M'Manus has been already convicted. But whether the preſent priſoners at the bar were partakers of the guilt, as acceſſaries before the fact, you are now called upon to determine.

The murder of Francis Shitz certainly roufed the indignation of the county. Its atrocity is unequalled by any thing of the kind hitherto known in Pennſylvania. The execution of the murder was as horrid, as the motives were baſe and grovelling.

The keeneſt ſenſations muſt ariſe in the minds of all good men, and worthy citizens, that in a government of laws, predicated on the ground of freedom, where the ſecurity of our perſons, und the protection of our property, are the primary objects of legiſlation, a maſſacre ſhould take effect that would diſgrace the manners and government of the moſt ſavage people!

It is proper, gentlemen, that this ſenſation in the public mind ſhould be encreaſed and exhilarated; to cauſe us collectively, and individually, to become more circumſpect in our obſervance of the conduct of each other, and more watchful of ſtrangers.

But, gentlemen, in the relative ſituations we now hold; called upon by the laws of our country to decide upon the life and death of fellow men, we have a different part to act.——Sitting as arbiters of the fate of theſe men, we muſt diveſt ourſelves of all prejudices we may have imbibed from ſtories told out of doors. We muſt diſregard all apprehenſions of ill-will from particular perſons, or any dangers that may ariſe to us from popular rage.

Here occupying the ſituations of Judges and Jurors, it is a ſacred duty, that each of us ſhould permit his underſtanding to be ruled and guided ONLY by the evidence which has been laid before us; and THAT EVIDENCE ONLY which is acknowledged and received by the laws of our country as genuine, ſhould have an operation on your minds. Evidence which the law pronounces to have no weight, though it ſhould, from the neceſſity of the occaſion, come into the view of the jury, muſt, when they are informed that it is legally ineffective, be laid totally out of the queſtion. Nothing, indeed, ſhould induce a conviction in a caſe of murder, but evidence legal in itſelf, fairly and openly delivered in Court. Paſſion, prejudice, and the rumours of the country, ſhould be done away. Cool inquiry; a deliberate examination and compariſon of the circumſtances one with the other, with a zeal for truth, ought to aſſume their places.

Here, I think it proper again to obſerve, that the confeſſion of one priſoner, though it names others of the priſoners as being concerned with him in guilt, ought not to operate as evidence to convict thoſe other priſoners. There is great reaſon in this rule of law. A man who has himſelf been guilty of an offence, ought not to be permitted to criminate another, in the abſence of that other; and when the priſoner, who makes the confeſſion, may have abandoned all hope of ſalvation here and hereafter; or perhaps becauſe he may have given himſelf up to a rage againſt the perſon whom he charges;

The priſoners are arraigned before you as acceſſaries before the fact to Charles M'Manus, who ſtands convicted of the murder of Francis Shitz.

The law defines an acceſſary before the fact, to be "One who being abſent at the time the crime is committed, does yet procure it to be done;—"counſels with another to do it,—or commands it to be done."

It is neceſſary to conſtitute this offence, that the priſoner ſhould have been abſent at the time of the commiſſion of the offence. For if he be preſent, aiding or abetting, he is then a principal.

A man may alſo be an acceſſary before the fact, though he does not communicate with the perſon who does the felony. As where A. prevails upon B. to procure C. to poiſon or kill D. If C. does kill D. A. though he never ſaw or ſpoke to C. upon the ſubject of the intended felony, is as much an acceſſary, and is as highly puniſhable as B. who procured C. to do the act.

As to the evidence before you, I ſhall recapitulate the prominent parts of it, as it reſpects each of the priſoners as they ſtand in order in the indictment. Having done this without comment, I muſt leave it to you to draw your own concluſions. It is not the duty of Judges, in caſes like the preſent, to preſs arguments for conviction, which do not ſtrike the mind ſo forcibly as at once to ſatisfy of guilt.

As to Hauer, gentlemen, when you conſider the teſtimony relating to his malice againſt the deceaſed, and his brother before the murder: His behavior immediately before the death of Francis Shitz, and after, and all this accompanied by his own confeſſion; you can have no heſitation but that againſt him there muſt be a verdict of guilty.

As to Donagan and Cox the evidence is merely circumſtantial and preſumptive. When this kind of evidence, unaccompanied by any thing poſitive, is brought before a jury to induce a conviction for murder, it ought to be received and acted upon with great caution.

Though even probable presumptions, which may be drawn from a variety of circumstances attending a crime, will authorize a jury in any case, whether of the highest or lowest kind of offences, to convict; yet as circumstances, particularly when few in number, are sometimes uncertain and fallible, it is certainly prudent for the judicious and conscientious juror to scrutinize all the circumstances minutely. If upon such scrutiny he can fairly make the conclusion of guiltiness, he ought to do it firmly and without fear of consequences. On the contrary if hesitation and doubt remain, upon contrasting all the occurences brought before him in evidence, the juror should as firmly and fearlessly pronounce the prisoner not guilty.——It is an excellent sentiment of a great lawyer and a most pious man, the famous judge Hale, That in cases of presumptive evidence, it is better that five guilty persons escape than that one innocent suffer.

The Judge then went into a particular detail of all the evidence that had been given, with the utmost impartiality and candor. He told the jury the Court would make no observations on the evidence, but leave them to judge of it for themselves; that they had heard the arguments and remarks upon the whole testimony, much at large, on both sides; and would decide for themselves what weight they were intitled to; and if they did not think the evidence sufficiently strong to convict, they ought to acquit without the fear of censure; but if they were satisfied in their consciences, that the prisoners were guilty, they ought as fearlessly to declare it.

Two bailiffs were then sworn to keep the jury together, in the common form, and the Court adjourned, when the jury retired, at four o'clock, on Sunday afternoon.

At half past seven o'clock in the evening, the jury had agreed upon their verdict. So great was the public curiosity, and so immense the croud of people, occupying the whole passage to the door of the Court-House, that when the Court went up to receive the verdict, it was with some difficulty they could get into the house.

The Court was opened,

CLERK of Oyer & Terminer.

Gentlemen of the jury, anſwer to your names—Cryer count.

CRYER. One, &c.

CLERK. Gentlemen, are you agreed on your verdict?

JURY. Yes.

CLERK. Who ſhall ſay for you?

JURY. The Foreman.

CLERK. John Hauer, hold up your hand—(which he did.)

How ſay you, gentlemen, is John Hauer guilty of the felony whereof he ſtands indicted, or not guilty?

FOREMAN. Guilty.

CLERK. Is Patrick Donagan guilty of the felony whereof he ſtands indicted, or not guilty?

FOREMAN. Not guilty.

CLERK. Is Francis Cox guilty of the felony whereof he ſtands indicted, or not guilty?

FOREMAN. Not guilty.

CLERK. Gentlemen of the jury, hearken to your verdicts, as the Court has recorded them. You ſay that John Hauer is guilty of the felony whereof he ſtands indicted, and that Patrick Donagan and Francis Cox are not guilty, and ſo you ſay all.———

JURY. Yes.

The Court adjourned until Monday morning at 10 o'clock.

On Tuesday, June 19th, Charles M'Manus and John Hauer were brought up to receive the judgment of the Court.

The number of people who attended to witness the solemn scene was very great; and during the whole time a most profound silence prevailed.

The president of the Court addressed the prisoners separately to the following effect:

You have been indicted for the murder of Francis Shitz; you have pleaded not guilty, and have put yourself for trial upon your country, which country have found you guilty. Have you any thing to say, why the Court should not pronounce judgment against you, according to law?

CHARLES M'MANUS (in a very respectful manner) said, NO, MY LORD. [The addition of MY LORD, was occasioned by his having lately come from Ireland, where the chief justice is addressed in that style; and he may have thought it proper.]

JOHN HAUER would not speak at all; but behaved, as he had done thro' the whole trial, in a disgusting and stupid manner.

HENRY, President.

The occasion requires I should say something to you, relative to your temporal concerns. If in doing this I can produce in your minds a just sense of the awfulness of your situation, the friendly act will exact from you a thankfulness, as for the only good which remains to you on this earth.

While you retain life, a devoutness of thought, and an intense contrition for your manifold iniquities, are indispensibly requisite to drag, as it were, by force, the forgiveness of your God upon you, and the quiet of your consciences. The principles of our religion, which, probably, before the commission of your crimes, had never been instilled into your hearts, are so benign and lenient as to furnish the strongest assurances to the most hardened

ſinners;—even to thoſe, who from the vileſt of all motives, have imbrued their hands in the blood of a neighbour and a brother, that they, upon a thorough repentance of their tranſgreſſion, ſhall be received into the arms of mercy.

'Tis to this holy religion you muſt turn your thoughts, and, in fervent adoration, ſupplicate our Saviour and Redeemer, that he may grant to you thoſe joys, and that felicity in futurity, which contrite and repentant ſinners always will receive!

A mere ſhow of repentance will not do.—Tears, ſhed becauſe of a reluctancy, in the bloom of youth and health, to relinquiſh the enjoyments of this world, will be ineffectual. Nothing but a ſincere offering of a broken heart, and an humble ſpirit, at the feet of the Deity can procure you a remiſſion of the enormous ſins of which you have been guilty.

To enable you to addreſs the divinity in a decorous manner, and that you may the more eaſily be led into the true path, to the boſom of your God and Saviour, I muſt adviſe you to ſolicit ſome pious and worthy miniſter of the goſpel, daily to attend you, with the aid of his exhortation and inſtruction.

A candid and pious acknowledgment of your various tranſgreſſions and impieties; and a reparation to ſociety, ſo far as is now in your power to effect, by a full diſcloſure of the part each of you took in this bloody buſineſs, will moſt aſſuredly obtain for you portions in the manſions of bliſs.—Without this effort be made by you, there can be no hope of ſalvation for you in the world to come.

Perhaps you may entertain a hope, that the mercy of the executive will interpoſe to ſcreen you from death. But of this there is little probability.—The atrociouſneſs and barbarity of your offences; the clearneſs and ſtrength of the evidence againſt you; fortified as it is by your ſeveral confeſſions, are ſuch, as, when repreſented to his Excellency the Governor, muſt inevitably render all ſuch expectations fallacious.

Your attention here ſhould be ſolely engaged in the preparation of your ſouls for another world;—where in a ſhort time you muſt appear before the tribunal of that Judge, who is all merciful to the penitent, but inexorable to the abandoned ſinner.

Lamenting your ſad condition here, and with the moſt warm wiſhes for your eternal happineſs, I muſt now proceed to pronounce that ſentence which the laws ordain, and your crimes merit.

It is conſidered and ordered by this court, That you Charles M'Manus, be taken to the jail of the county of Dauphin, from whence you came, and from thence to the place of execution, and there be hanged by the neck until you be dead.

It is conſidered and ordered by this court, That you, John Hauer, be taken to the jail of the county of Dauphin, from whence you came, and from thence to the place of execution, and there be hanged by the neck until you be dead.

God have mercy on your ſouls!——

Elizabeth Hauer and Hugh M'Donough were brought up on Monday the 18th of June, and a Jury ſworn. But the Commonwealth gave no evidence againſt them, and they were immediately acquitted.

Solomon Hauer was tried on the ſame afternoon, and upon the evidence of Peter Shitz, was convicted of an aſſault and battery upon the ſaid Peter, with an intent to kill and murder him.

The Commonwealth having no evidence in their power againſt Peter M'Donough, he was, on motion, diſcharged without trial, under the HABEAS CORPUS act. It was not thought prudent to try and acquit him, from a full perſuaſion of his guilt, and with an expectation that ſufficient evidence may hereafter appear to convict him.

Patrick Donagan and Francis Cox are ſtill in confinement, under the orders of the Court, till they find ſecurity for their good behaviour. For although the Jury thought the evidence not ſufficiently ſtrong to juſtify a conviction; yet from all the circumſtances, there is the greateſt reaſon to believe that they were deeply concerned in the horrid crime.

On Saturday, July 14, 1798, at 12 o'clock at noon, CHARLES M'MANUS and JOHN HAUER were executed on the public ground in Harriſburgh, in purſuance of their ſentence. The deportment of Hauer was much more decent and compoſed than was expected from his conduct ſince his trial and condemnation; during which time he was never known to utter a ſyllable, although every exertion was uſed which humanity could dictate or art deviſe. He perſiſted in remaining in the moſt indelicate and filthy ſituation, not admitting the leaſt kind of covering to his nakedneſs; and attempting at every opportunity to bite thoſe who came within his reach: one perſon was very much wounded by him in this manner. It was generally thought his ſingular behavior was feigned, as he had once before, it is ſaid, eſcaped condign puniſhment by a ſimilar conduct. But whether his dumbneſs was real or affected, he was at leaſt conſiſtent, and ſuſtained the concluding ſcene without opening his lips—though without any ſymptom of inſanity. From whatever cauſe it proceeded, there is ground to believe that latterly he was really incapable of ſpeaking. Extreme terror has been known to produce this effect.

M'Manus, in his laſt moment, confirmed the teſtimony he had given to the grand jury, viz. That he was not in the houſe, or preſent at the murder; but that he held a horſe at the end of a lane, in order to aid the eſcape of the perpetrators, who were, he ſaid, Hauer and Peter M'Donough. He appeared with the ſame manly and even cheerful reſignation, which he had invariably preſerved during his trial and impriſonment; and which, added to his youth, had, notwithſtanding the atrocity of his crime, procured him no inconſiderable degree of the public ſympathy and favor. And although in every view, a juſt object of the puniſhment he ſuffered, yet the certainty that ſome of the partakers, perhaps promoters of his guilt, had eluded the hand of juſtice, could not fail to excite an unavailing regret at the inefficacy of human tribunals—too often baffled, by the ſkill of old and hardened offenders, in guarding againſt the means of detection.

The following is the laſt SPEECH and DYING CONFESSION of CHARLES M'MANUS, who was Executed at Harriſburgh, (Penn.) July 14, 1798, for the Murder of FRANCIS SHITZ, as taken down from his own Mouth, a ſhort time before his Death, by the Publiſher, in the preſence of the Rev. HENRY MOELLER.

As it has been uſual with poor unhappy Mortals who are brought to the dreadful ſituation with myſelf, to leave behind them ſome accounr of their ſinful lives—I have thought it my duty, in like manner, to make this confeſſion, in hopes it may prove a ſolemn warning to all Sinners and eſpecially to thoſe, who may be ſpectators to my ignominious Death.

I was born at Enniskellen, in the county of Fermanagh, and kingdom of Ireland, of honeſt, induſtrious and reſpectable Parents: My father was of the Roman Catholic Religion, but my mother was of the Church of England—to my mother's perſuaſion I have been moſt accuſtomed, which naturally produced an early partiality on her part towards me—and many a time has ſhe given me the beſt of advice, and often, with tears of affection, pleaded with me to guard againſt my youthful follies. But alas! how ſoon did I forget her maternal inſtructions—for I had ſcarcely attained my fourteenth year, before I began to form ſchemes for the purpoſe of ſeducing honeſt women, in which abominable wickedneſs, I have been but too often ſucceſsful, both with married and ſingle; and have had three children laid to my charge in conſequence of this illicit behaviour.

At the age of fifteen years, I was lawfully married to Polly Brown, of a reſpectable family in my native country—She is now here, to witneſs the awful end of her unworthy huſband. By her I have had one ſon, who to the beſt of my knowledge, is now living, about five years old.

In July, 1796, I came over to America, and a few days after I landed, came to this county, and worked with ſeveral people, viz. Henry Grubb, George Illick, Jacob Whiteman, Michael Hoch, and George Calbach, to all of whom I ſtrived my utmoſt to give ſatisfaction by a faithful and diligent attention to my employment.

Although I confeſs myſelf to be heinouſly wicked in the ſight of God—and deſerving the melancholy death that will ſhortly be inflicted, agreeably to the laws of this country; yet, I ſolemnly declare, in the preſence of that God, before whoſe awful tribunal I expect in a few hours to appear, to give an account of all the deeds done in this life, That the Depoſition which I gave to the Grand Jury in March laſt, was the whole truth. But I acknowledge that the woman I ſpoke of in my teſtimony before Squire Carpenter, was not my wife, but one of thoſe females I had wickedly led aſtray:—Neither was it true, that I purchaſed the Piſtols, as I have repreſented. It was Peter M'Donough who procured them, as well as the large Knife and a Bullet Mould, in Lancaſter.

I cannot tell whether it was John Hauer or Peter M'Donough who perpetrated the fatal murder; but after they had returned to me, where I was holding the Horſe, at the end of the Lane, Hauer informed me that one of the Shitzes had made his eſcape; however, ſaid he, if he does not die with what he has got, and I am not put to Gaol for this, I will ſhoot him, and if I am, my wife will poiſon him, which ſhe would have done long ago to both, had ſhe not thought it a pity for the Girl and two little Boys in the ſame houſe.

Before I leave this world, I conceive it a duty I owe to Humanity and to my God, to make known, that Peter M'Donough, Hugh M'Donough, Francis Cox, and Patrick Donagan, were to my knowledge, aiding in the

Helliſh plot (for which I am to ſuffer) equally with myſelf: And that John Hauer, my fellow-ſufferer, has declared to me, that his wife Elizabeth Hauer, was alſo privy and aſſiſted in forming the horrid deed againſt her brothers, as alſo his brother Solomon Hauer: And that it was ſettled between him and Peter M'Donough, to deſtroy me afterwards. The latter part of this information Hauer made known to me, while we were confined in one apartment together, and during the time he has behaved ſo uncommon to all who viſited him, in order to appear inſane: But in private, has often informed me how he would behave, in order to frighten the people into a belief of his lunacy;—and repeatedly declared ſince we have been confined, that if he eſcaped this time he would aſſuredly deſtroy the ſurviving brother, Peter Shitz.

It is alſo my duty to diſcloſe, for the ſecurity of my fellow creatures, a horrid Murder, perpetrated by Peter M'Donough, on his Uncle in his native country, about 8 years paſt: The old gentleman was a Bachelor of conſiderable Eſtate, and betrothed to a young woman in his neighbourhood: Peter fearing this would be the means of excluding him from the inheritance, took the wicked reſolution to murder him, which he fatally effected, by ſtabbing him in a moſt barbarous manner, and afterwards threw the bleeding corpſe upon the fire, which burned away a great part of his head. He was cleared on his trial, by reaſon of perjury (known to be ſo after his eſcape) of the principal Witneſs, named Molly Farley, to whom he has ever ſince been attached—and ſhe was to have been a principal Witneſs againſt him at the late Court—but has diſappeared, and by that means he has eſcaped the ſecond time, that awful juſtice which awaits him.

I return my ſincere thanks to the worthy Miniſters of the Goſpel, who have attended me in my ſolitary priſon for the good of my ſoul; and truſt I feel greatly relieved from the heavy burden of ſin which has preyed upon my ſoul from their bleſſed counſel—may God reward them for their kind ſervices. I have received unmerited tenderneſs and humanity from all the Gentlemen of Harriſburgh, whoſe pity has excited them to viſit me. I pray them to accept my laſt thanks.

I can truly affirm I have never ſtolen any thing in my life, nor did I ever cheat any perſon, to my knowledge, of the value of a ſhilling. But I confeſs myſelf guilty of knowing and aſſiſting in the dreadful and cruel Murder which I muſt in a few—alas! very few hours expiate with my own life! And I pray, my fellow-creatures, who may witneſs my ſhameful Death, to beware of the temptations that young and ſuſceptible minds are always in danger of. In following too much the dictates of my own deſires, I forgot my religion—alas! I forgot my God!—And now cloſe my eyes on all earthly things, and die in the prime of life, aged a little more than Twenty Years!—in full hopes that my Heavenly Father, will accept my penitent Soul, through the merits of his Son Jeſus Chriſt, who died to ſave Sinners.

(Signed) CHARLES M'MANUS.

In the Goal at Harriſburgh, July 12, 1798.